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PART I – PRINCIPAL CONSTITUTIONAL AREAS

A. ADMISSIONS AND CONFESSIONS

GENERAL GROUNDS FOR EXCLUDING STATEMENTS

§ 1.00. Involuntariness and coercion

Alabama Suspected of burglary, defendant was accorded his *Miranda* rights and questioned. He denied having committed the crime and asked for a lie detector test. The test was administered and he was told that the results indicated that he "had not taken the money but knew something about it." Questioning was resumed that day and the following morning, when he made a confession.

Defendant was convicted and he appealed, contending, among other things, that the trial court had erred in overruling his motion to produce the record and results of the lie detector test. This information was essential, he asserted, to prove that the confession was obtained by subterfuge and was, therefore, involuntary.

The Supreme Court of Alabama affirmed. "In our judgment," said the court, "the sole question raised is whether a confession obtained through trickery is voluntary." The court then said that "the remarks by the police concerning [defendant's] polygraph test could not be said to have a likelihood of producing a false confession, and the mere fact a lie detector examination was involved in procuring the confession would not render it involuntary." Canada v. State, 325 So. 2d 513 (1976), 12 CLB 467.

§ 1.80. Fruit of an illegal arrest

Pennsylvania *See* Commonwealth v. Sams, 350 A.2d 788 (1976), 12 CLB 466, CLD § 30.03.

MIRANDA

§ 1.98. Miranda—in general

United States Supreme Court Defendant, who had been arrested in connection with certain robberies and who was properly advised of his *Miranda* rights, declined to discuss the robberies, although he did not ask for an attorney. The detective promptly ceased the interrogation, and defendant was taken to a cellblock. More than two hours later, after giving *Miranda* warnings, another detective questioned defendant solely about an unrelated murder. Defendant made a statement implicating himself in the homicide. The second interrogation lasted about fifteen minutes, and at no time did defendant ask for a lawyer or indicate that he did not want to discuss the homicide.

Defendant's inculpatory statement was later used in his trial for murder after the trial court had denied defendant's motion to suppress. Defendant was convicted of first-degree murder.

The Supreme Court vacated reversal of the conviction by the Michigan Court of Appeals (Brennan and Marshall, J.J., dissenting).

Resolution of the issue, said the Court, turned almost entirely on the interpretation of a single passage in the *Miranda* opinion, upon which the Michigan appellate court relied in finding a *per se* violation of *Miranda*. This passage states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent." Interpreting the passage literally, said the Court, "would lead to absurd and unintended results." On the one hand, to permit continuation of the interrogation after a momentary

cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a "blanket prohibition" or "permanent immunity" from further interrogation, regardless of the circumstances, would lead to the equally untenable result of unduly impeding police investigative activity.

The proper solution, concluded the Court, was to hold, as it now did, that

> "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'"

It was clear that the police here had immediately ceased the interrogation, and had resumed questioning "only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."

The dissent thought the majority's "distortion" of *Miranda's* constitutional principles was another step toward "the erosion and . . . ultimate overruling of *Miranda's* enforcement of the privilege against self-incrimination." Continued the dissent:

> "Today's decision . . . virtually empties *Miranda* of principle, for plainly the decision encourages police asked to cease interrogation to continue the suspect's detention until the police station's coercive atmosphere does its work and the suspect responds to resumed questioning."

Michigan v. Mosley, 96 S. Ct. 321 (1975), 12 CLB 329.

Illinois After three days of being held and questioned on *unrelated* charges, defendant "voluntarily" confessed to the murder in question. Prior to his initial questioning on the morning of his arrest, defendant, upon being recited his *Miranda* rights, told the interrogating officer that he did not want to answer questions but would "rather see a lawyer."

Although the officer did not proceed to question him at this point, no attempt was made to furnish defendant with counsel at any time up to the time he made his confession. In the intervening period, the questioning on unrelated charges had been resumed. In each instance, defendant was read his *Miranda* rights but did not repeat his request for counsel.

Held, in sustaining his murder conviction, that notwithstanding the initial *Miranda* violation, and although the case was a "close one," and defendant was a "borderline retardate with an I.Q. of 76," he, nevertheless, had not been deprived of his constitutional rights, since the violation was merely "procedural" in nature, and its adverse effect "was sufficiently dissipated by lapse of time, repeated admonitions and other intervening events [a lineup and the taking of a palm print] so that the defendant's confession was voluntary and was therefore properly received in evidence." People v. White, 335 N.E.2d 457 (1975), 12 CLB 199.

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 2.00. Prerequisite of custodial interrogation

United States Supreme Court Special agents of the Internal Revenue Service, investigating potential income tax evasion, paid a surprise visit to the home of defendant and advised him as follows:

> "As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws, and related offenses.
>
> "Under the Fifth Amendment to the Constitution of the United States, I

cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding."

The agents then conducted a noncustodial interview, which they described as "friendly" and "relaxed." Prior to trial for attempting to evade or defeat federal income tax evasion, defendant moved unsuccessfully to suppress all statements he made to the agents or evidence derived from those statements on the ground that he had not been given the warnings mandated by *Miranda*. He was convicted, and his conviction was upheld on appeal.

The Supreme Court affirmed the conviction. *Miranda*, said the Court, had "specifically defined 'focus,' for its purposes, as 'questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" Defendant here had not been taken into custody. Moreover, the circumstances of the interview in the instant case did not present such "inherently coercive" elements as to require *Miranda* application even in the absence of custodial interrogation. Hence, the statements made by defendant to the agents during the noncustodial interview were admissible in evidence against him notwithstanding the absence of *Miranda* warnings. Beckwith v. United States, 96 S. Ct. 1612 (1976), 12 CLB 601.

Court of Appeals, D.C. Cir. A police officer, hearing a burglar alarm emitted from a retail tire store, went to the roof of the store where he observed the shadow of a man. Encountering the defendant, he ordered him at gunpoint to "hold it right there." As he proceeded to handcuff the defendant, the officer asked him "What are you doing here?" Defendant responded with the inculpatory statement, "Just getting tires, man." This exchange took place within "one or two seconds" of the apprehension and prior to the giving of any *Miranda* warnings. Defendant's pretrial motion to suppress was denied, and he was convicted of attempted burglary of the tire store.

In affirming the conviction, the court held that at the time when the verbal exchange took place, defendant was still in the process of being apprehended and hence was not, in the exact words of the *Miranda* decision, being *"held for interrogation."* While the doctrine of *Miranda* is to be interpreted liberally, said the court, the circumstances of the instant case indicated that the question was asked as part of a "unitary transaction" and for the purpose of "seeking a justification for the seemingly criminal conduct" of defendant rather than "an event separately orchestrated by the police to obtain evidence." Owens v. United States, 340 A.2d 821 (1975), 12 CLB 83.

§ 2.10. Sufficiency of warnings

Arkansas Police officers, in according defendant his *Miranda* warnings, advised him prior to interrogation that "we have no way of giving you a lawyer, *but one will be appointed you, if you wish, if and when you go to Court.*" Defendant confessed under questioning, and was subsequently tried and convicted.

Rejecting defendant's contention that the italicized portion of the warning was deficient, the court pointed out that, while the warning was deficient to an indigent, it would not be deficient to one who could afford to employ counsel. Hock v. State, 531 S.W.2d 701 (1976), 12 CLB 464.

Wisconsin A *Miranda* warning contained the statement:

"We have no way of giving you a lawyer if you cannot afford one, but one

may be appointed for you, if you wish, if and when you go to court."

The court held that the "questionable language"—i.e., the failure to clearly inform defendant of his right to have counsel appointed immediately—was rendered harmless where the admonition went on to say that the defendant had the right to remain silent and if he had no lawyer present that he had "the right to stop answering questions at any time." Moreover, noted the court, this was the sixth *Miranda* warning defendant had received in less than eight hours, and all prior warnings were, "without question," sufficient. Grennier v. State, 234 N.W.2d 316 (1975), 12 CLB 200.

§ 2.11. Time of warning

Alabama Defendant was given his *Miranda* warnings and interrogated. He made a statement. Three or four days later, he was again interrogated. On this occasion, the officer did not read him his *Miranda* rights but asked him instead, if he was aware of his rights. Defendant responded that he was, and made a second incriminating statement.

Held, the second statement was properly admitted at trial. It is not necessary, said the court, for a defendant to be given *Miranda* warnings before each separate interrogation. Nor were there any extraordinary circumstances in the instant case, or excessive delay, which would merit the giving of *Miranda* rights again, concluded the court. Johnson v. State, 324 So. 2d 29 (Ala. Crim. App. 1975), 12 CLB 344.

§ 2.20. Waiver

Pennsylvania *See* Commonwealth v. Riggs, 348 A.2d 429 (1975), 12 CLB 360, CLD § 89.40.

§ 2.35. Silence as an admission (See also § 23.00.)

Pennsylvania The arresting officer testified that he had arrested defendant and informed him of his constitutional rights, whereupon the prosecutor asked, "Did [defendant] ever say anything to you?" The officer replied, "We had several conversations. I advised him to – that he had the right to remain silent, and he didn't actually make any statements other than general conversation."

The Pennsylvania Supreme Court held, "It is reversible error to admit evidence of a defendant's silence at the time of his arrest." The court rejected the prosecution's argument that it expected a different answer and thus did not intend to raise such an inference of guilt in the minds of the jury, saying:

> "The witness's testimony . . . necessarily carries the implication that the [defendant] remained silent and failed to deny his involvement. Such testimony implies an admission of guilt. An admission of guilt constitutes highly prejudicial evidence and cannot be considered harmless error. The order of the Superior Court granting a new trial is therefore affirmed."

Commonwealth v. Greco, 350 A.2d 826 (1976), 12 CLB 476.

§ 2.60. Applicability of Miranda to other proceedings

Maryland Defendant was arrested for rape, allegedly perpetrated at knifepoint. He was taken to police headquarters and accorded *Miranda* warnings. The interrogating officer, while refraining from asking defendant any question directly involving the alleged offense, asked defendant for his address and for a specific and detailed description of the house where he resided – including the colors of the walls, floors, and door of the room which he occupied.

A search warrant was, in fact, procured, and during the search, an incriminating knife was found. Defendant moved unsuccessfully to suppress.

Held, in sustaining the conviction, that *Miranda* "is inapposite since there was a singular lack of any admission, confession or other inculpatory statement on [defendant's] part." The questions asked of the defendant, the court indicated, were routine and nonincriminating, and the police would have found the place anyway. Mills v. State, 345 A.2d 127 (Md. App. 1975), 12 CLB 200.

§ 2.70. Use of statement obtained in violation of Miranda

California In a landmark decision interpreting the California Constitution's self-incrimination clause, that state's Supreme Court rejected its previous "uncritical acceptance" of the rationale adopted by the United States Supreme Court in fashioning the "impeachment exception" to the *Miranda* exclusionary rule in Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971).

It was held in *Harris* that statements which were inadmissible as affirmative evidence because of a failure to comply with *Miranda* could nevertheless be used for impeachment purposes to attack the credibility of a defendant's trial testimony, as long as the statements were not "coerced" or "involuntary."

The California Supreme Court took issue with the position of the majority in *Harris* that a distinction existed between an involuntary confession and one that was merely illegally obtained. Prior to *Miranda,* the court noted, there had been a long series of cases, which had "spawned multiple categories identifying impermissible interrogatory practices, many being more subtle than traditional notions of coercion." Viewed in this light, *Miranda* served the function of establishing with precision "a single, uncomplicated, universally applicable test for determining whether a particular warning was coerced." Thus, said the court:

"If proper warnings are given voluntariness is assured, at least in the absence of evidence of 'traditional' coercion. Conversely, if an accused is inadequately informed of his rights involuntariness is assumed, and the statements are inadmissible at trial."

The *Harris* rule, then, by sweeping away this aspect of *Miranda* protection, could only have the effect of throwing the courts' back into the morass of case-by-case determinations of voluntariness under the pre-*Miranda* voluntariness test.

More important, said the court:

"Our principal objection to the *Harris-Nudd* rule lies in the considerable potential that a jury, even with the benefit of a limiting instruction, will view prior inculpatory statements as substantive evidence of guilt rather than as merely reflecting on the declarant's veracity. The theory of a limiting instruction loses meaning in this context. . . . It is thus clear that a defendant faced with the prospect of the jury hearing his admittedly illegally obtained confession if he testifies in his own behalf will be under considerable pressure to forego this most basic right of an accused. Such a result is certainly not what *Miranda* envisaged."

Finally, the *Harris* exception could only serve to encourage circumventions of *Miranda* requirements by the police and to implicate the courts in such illegal conduct. People v. Disbrow, 127 Cal. Rptr. 360, 545 P.2d 272 (1976), 12 CLB 615.

PROCEDURAL QUESTIONS RE ADMISSIBILITY OF STATEMENTS

§ 3.00. Procedure for determining admissibility

Pennsylvania *See* Commonwealth v. Green, 347 A.2d 685 (1975), 12 CLB 344, CLD § 43.02.

B. RIGHT TO COUNSEL

TYPE OR STAGE OF PROCEEDING

§ 5.22. Right to counsel of one's own choosing

Court of Appeals, 2d Cir. The prosecution in a narcotics case moved to disqualify the firm of attorneys hired by the defendants on the ground that the firm's prior representation in similar criminal cases of three persons who the prosecution planned to use as witnesses constituted a conflict of interest. The trial court, upon ascertaining that two of the witnesses had no intention of waiving their attorney-client privileges with respect to the confidential communications with the firm, concluded that the firm's ability to properly represent the defendants on cross-examination of these witnesses would thereby be impaired and ordered the attorneys disqualified.

The Second Circuit reversed and remanded with directions to give the defendants the opportunity to elect to proceed with the retained firm upon a knowing and intelligent waiver of any claims which might arise from their attorneys' conflict of interest. The trial judge, said the court, should fully explain the nature of the conflict and disabilities thereby placed upon the retained attorneys. Said the court:

> "Of course, a defense counsel's conflict of interests may impair his effectiveness in assisting his client, or in confronting witnesses on behalf of his client. The client, however, may waive his Sixth Amendment rights to effective assistance of counsel and to confrontation of witnesses, just as he may knowingly and intelligently waive any constitutional right."

United States v. Armedo-Sarmiento, 524 F.2d 591 (1975), 12 CLB 197.

§ 5.25. Misdemeanors

Georgia The state introduced, during the sentencing phase of a felony prosecution, two prior misdemeanor convictions of defendant without counsel, to which defendant objected. The court of appeals affirmed, holding that it was unaware of any authority which made Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1971), retroactive to prior misdemeanors.

Reversing, the Georgia Supreme Court said:

> "We hold today that without a valid waiver, the lack of counsel at a trial for a misdemeanor so affects the integrity of the fact-finding process and the reliability of the guilty verdict that the ruling in *Argersinger* must be retroactively applied."

Noting that the United States Supreme Court had retroactively applied Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), which gave the right to counsel in felony cases because the "lack of counsel jeopardized the accuracy and fairness of the entire trial," the Georgia Court said:

> "We are unable to see how the integrity of a misdemeanor conviction can be any less affected by a lack of counsel than a felony conviction. . . . The requirement of a fair trial is the same in both felony and misdemeanor trials as requirements of due process do not distinguish between long and short incarcerations."

Morgan v. State, 221 S.E.2d 47 (1975), 12 CLB 462.

§ 5.70. Military court-martial

United States Supreme Court Various servicemen challenged the authority of the military to try them at summary courts-martial without providing them with counsel.

The Court held that there was no Sixth

Amendment right to counsel in a summary court-marital, since that proceeding was not a "criminal prosecution" as that term is used in the Amendment. Even in a civilian context, said the Court, the fact that a proceeding would result in loss of liberty, did not ipso facto mean that the proceeding was a "criminal prosecution." Here, considerat[illegible] peculiar to the purposes and opera[illegible] of "the much more tightly regiment[illegible] military community" underlined the distinction between a traditional trial and a summary court-martial. In fact, much of the conduct proscribed by the military was not "criminal" conduct in the civilian sense of the word, and conviction for such offenses, as for example unauthorized absences, did not carry the stamp of "bad character." Moreover, from a procedural standpoint, a summary court-martial, unlike a criminal trial, "is not an adversary proceeding" – one of the "touchstones of the Sixth Amendment's right to counsel."

Congress, said the Court, had designed the summary courts-martial to deal with relatively insignificant offenses in a quick, efficient, informal, and inexpensive manner in order to free the military for more important duties. In view of these considerations and of the right of an accused serviceman to refuse trial by summary court-martial and to proceed to trial before a body wherein counsel would be provided, the Court held that the Fifth Amendment did not require provision of counsel for accused persons before summary courts-martial under any circumstances. Middendorf v. Henry, 96 S. Ct. 1281 (1976), 12 CLB 602.

§ 6.10. Appeals—in general

Missouri *See* Franklin v. State, 529 S.W.2d 954 (Mo. App. 1975), 12 CLB 357, CLD § 71.30.

Tennessee *See* State v. Williams, 529 S.W.2d 714 (1975), 12 CLB 201, CLD § 71.40.

EFFECTIVENESS AND ADEQUACY OF REPRESENTATION

§ 7.00. Ineffectiveness—in general

Pennsylvania During cross-examination of a robbery victim, appointed defense counsel from the Public Defender's Office learned for the first time that the victim had identified defendant at a pretrial lineup occurring nearly a year after the robbery. Although the victim was the only person to identify defendant as the robber, defense counsel nonetheless failed to ask for a recess or continuance in order to investigate the pretrial lineup. Defendant contended that his counsel's failure to ask for a recess to investigate the pretrial lineup was ineffective assistance of counsel.

Held, "This attack on the victim's identification was highly relevant and could have been decisive in acquitting" defendant, and the court could not say that defense counsel's failure to investigate the pretrial lineup was "reasonable trial strategy or designed to further his client's interest." Commonwealth v. Hillman, 351 A.2d 227 (1976), 12 CLB 464.

"Prisoner Satisfaction With Defense Counsel" by Burton M. Atkins and Emily W. Boyle, 12 CLB 427 (1976).

§ 7.02. Duty of assigned counsel

"Prisoner Satisfaction With Defense Counsel" by Burton M. Atkins and Emily W. Boyle, 12 CLB 427 (1976).

"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

§ 7.10. Conflict of interest in joint representation

Washington The mere fact that a robbery defendant and his codefendant were represented by the same court-appointed attorney did not constitute a conflict of interest where the defense theories of both defendants were "totally compatible." Defendant had admitted that he had

taken the victim's money after a fight between himself and the victim, but he had asserted diminished capacity as a result of being under the influence of drugs and alcohol. His codefendant had taken the position, both in pretrial statements and on the stand, that he had attempted to break up the fight and had not known about the taking of the money until some time later. State v. Meyers, 545 P.2d 538 (1976), 12 CLB 617.

§ 7.15. Other conflicts of interest

New Mexico Affirming the denial of defendant's motion for postconviction relief, the court held that defendant was not entitled to a new trial because of the fact that defendant's former defense attorney became an employee of the district attorney's office which prosecuted the case.

Noting that defendant's claim was not raised either at trial or on appeal, the court held that it was a "stale" claim which, moreover, was not based on any unfairness in the proceedings against defendant. Rather, the claim was based on an "appearance of unfairness," which was shown to be "untrue" in an evidentiary hearing in which the trial court had found that the defense attorney had severed all connection with the case when he became an assistant district attorney; had never discussed the case with the district attorney or any of his assistants; had nothing to do with the trial; never talked to the prosecutor; and lent no assistance in the prosecution. State v. Mata, 543 P.2d 1189 (1975), 12 CLB 360.

Court of Appeals, 2d Cir. *See* United States v. Armedo-Sarmiento, 524 F.2d 591 (1975), 12 CLB 197, CLD § 5.22.

§ 7.20. Limitations placed on the right of attorney and client to confer

United States Supreme Court During defendant's federal prosecution, the trial court consistently ordered the sequestration of witnesses for both sides. At the conclusion of defendant's own testimony on direct examination and shortly before cross-examination was to begin, the court declared an overnight recess. At the request of the prosecutor, the court then ordered defendant to refrain, during the seventeen-hour interim, from consulting with his counsel "about anything."

The United States Supreme Court held that the challenged order impinged upon defendant's right to the assistance of counsel guaranteed by the Sixth Amendment. A sequestration order applied to a criminal defendant affects the defendant quite differently from a nonparty witness. A defendant is ordinarily ill equipped to comprehend the trial process without a lawyer's guidance, must often consult with counsel during trial, and during overnight recesses, often discusses the events of the day's trial and their significance. Said the Court in this connection:

> "The recess at issue . . . was an overnight recess, 17 hours long. It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill equipped to understand and deal with the trial process without a lawyer's guidance."

The problem of improper influence on testimony or "coaching" could be dealt with in other ways, said the Court:

> "A prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess. . . . Skillful cross-

examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination. . . ."

"To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' the conflict must, under the Sixth Amendment, be resolved in favor of the rights to the assistance and guidance of counsel."

Geders v. United States, 96 S. Ct. 1330 (1976), 12 CLB 600.

§ 7.50. Denial of opportunity to make summation

United States Supreme Court A New York statute, which conferred upon a trial judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment, was struck down as constituting an impermissible infringement upon the adversarial fact-finding process protected by the Sixth Amendment of the Constitution as applied against the states by the Fourteenth. Noting that "the right to assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process," the Court held that closing argument for the defense was, indeed, "a basic element of the adversary factfinding process in a criminal trial."

The Court noted, however, that presiding judges have always had, and would continue to have, great latitude in controlling the duration and limiting the scope of closing summations. But, said the Court, there could be no "justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all." Herring v. New York, 95 S. Ct. 2550 (1975), 12 CLB 74.

§ 7.56. Failure to introduce evidence or make objections

Missouri Defendant was jointly indicted along with three others for burglary and stealing. He thereafter moved to have the judgment of conviction vacated on the ground that he was denied effective assistance of counsel. He based his claim on the failure of his retained trial attorney to object or to request a mistrial when the prosecutor, during opening argument, told the jury that the other three codefendants had either been convicted by a jury or had pleaded guilty.

Held, the prosecutor's remarks, *if objected to*, would have been grounds for a mistrial.

"However, no such objection was made either at the time, in the motion for new trial, or by new counsel who filed a supplemental motion for new trial and who handled the direct appeal. The question at this late stage has become whether failure of trial counsel to object, now raised for the first time by a new third counsel, was so grossly unfair to defendant's fundamental rights as to require overturning the entire proceedings.

"The trial court, who presided at the original trial, thought not. This court, after reviewing the entire record, can find no clear error in that conclusion."

McConnell v. State, 530 S.W.2d 43 (Mo. App. 1975), 12 CLB 359.

WAIVER OF RIGHT TO COUNSEL

§ 7.72. Right to defend pro se

United States Supreme Court Well be-

fore the date of trial, a California defendant indicated to the court his desire to conduct his own defense rather than accept appointment of counsel. Three weeks later, the trial judge conducted a hearing to determine defendant's ability to do so. In view of defendant's answers and his demeanor, the judge ruled that defendant had not made an intelligent and knowing waiver of his right to assistance of counsel and reappointed the public defender to represent him. Thereafter, the court would only allow the defense to be conducted through the appointed attorney. Defendant was convicted. On grant of certiorari, the United States Supreme Court (Burger, C.J., Blackmun and Rehnquist, J.J., dissenting) reversed.

The Court held that implicit in the Sixth Amendment was an affirmative right of self-representation. The Sixth Amendment, the Court pointed out, speaks of the "assistance" of counsel, clearly contemplating that counsel shall serve as an "aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." An attorney, the Court argued, who is thrust upon a defendant against the defendant's will is "not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists."

In the instant case, the Court continued, the record demonstrated that defendant was literate, competent, and understanding, and that he had voluntarily exercised his informed free will. Said the Court: "His technical legal knowledge, as such, was not relevant to an assesment of his knowing exercise of the right to defend himself." Faretta v. California, 95 S. Ct. 2525 (1975), 12 CLB 73.

Court of Appeals, 10th Cir. Prior to the start of defendant's trial for assaulting a prison officer and instigating a jailhouse mutiny, defense counsel moved to allow defendant "to assist at trial in his own defense," arguing that "only a prisoner, who is peculiarly familiar with the conditions, practices, and procedures in a prison, can fully apprehend and respond to testimony of prisoners and prison guards." The motion was denied.

Defendant was convicted, and, on appeal, contended that the trial court's failure to allow him to represent himself and appear in propria persona violated 28 U.S.C. § 1654, which gives a defendant that right. Defendant also contended, after briefing, that his position was also supported by the Sixth Amendment as interpreted by Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975), which held that although not stated in the Sixth Amendment, the right to self-representation is "necessarily implied by the structure of the Amendment."

The court held that it was convinced that defendant's request was for "hybrid representation," despite his contention that it was not. The established rule prior to *Faretta*, said the court, is that a party has the right to represent himself or to be represented by counsel, but he does not have a right to hybrid representation, although a trial judge may allow it in appropriate cases.

In the court's view, "*Faretta* does not alter the established rules concerning hybrid representation." Moreover, concluded the court, the "Sixth Amendment does not give any indication that hybrid representation is a right of constitutional dimensions. Title 28 U.S.C. § 1654 is written in the disjunctive – 'parties may . . . conduct their own cases personally *or* by counsel. . . .' Thus no statutory right of hybrid representation is accorded." United States v. Hill, 526 F.2d 1019. ([Kan.] 1975) 12 CLB 454.

Maryland Defendant's assigned attorney informed the court that defendant wished to proceed without counsel. The trial judge permitted defendant to proceed

without counsel, without making any inquiry that would cause defendant to "be made aware of the dangers and disadvantages of self-representation."

Reversing defendant's convictions and remanding for a new trial, the court noted that the instant case came to trial prior to, and necessarily was decided without the guidance of, Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). The court concluded that "in the absence of such an inquiry when there is an expressed desire for self-representation, we are not permitted to assume from a silent record that the defendant 'knowingly and intelligently' chose such a course. Neither are we permitted to assume that defendant would have elected to proceed with the assistance of counsel if such an inquiry had in fact been made."

Nor was the requirement to make such inquiry obviated by the fact that assigned counsel was permitted to sit at the trial table and substantially participated in the management of the trial. Hamilton v. State, 351 A.2d 153 (Md. Spec. App. 1976), 12 CLB 463.

C. RIGHT OF CONFRONTATION

§ 8.00. Codefendant's statement

Court of Appeals, 2d Cir. Defendant and his codefendant were jointly tried on narcotics charges. During the course of the trial, the codefendant fled. The trial court permitted the joint trial to proceed, but instructed the jury that although flight is probative of guilt, such evidence should be considered only against the fleeing codefendant. Defendant contended that the limiting instruction was inadequate in light of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968).

Sustaining the conviction, the court held that even if codefendant's flight could be considered a form of nonverbal "assertion" of guilt, *Bruton* had no application where, as here, the hearsay utterance of the one defendant did not inculpate the other. The codefendant's flight did not imply the guilt of anyone but himself, said the court. United States v. Lobo, 516 F.2d 883 (1975), 12 CLB 78.

Court of Appeals, 4th Cir. Defendants *X*, *Y*, and *Z* were jointly tried for conspiracy to obstruct justice and obstruction of justice in connection with the shooting of a government witness in a criminal investigation. At the trial, a prosecution witness testified, over defense objection, that two days after the shooting, defendant *X* had told him that he had shot the victim after being hired for that purpose by defendant *Y*. The declarant (defendant *X*) did not take the stand to testify in his own behalf.

Held, in reversing the conviction, that Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968),

> "*[H]eld* that because of the substantial risk that the jury, despite instructions to the contrary, may look to the incriminating extrajudicial statements in determining guilt of those other than the declarant, admission of such statements in a joint trial violates the right of cross-examination secured by the confrontation clause of the Sixth Amendment, 391 U.S. 123, 126, 88 S. Ct. 1620, 20 L.Ed. 2d 476.
>
> "Such limiting instructions do not prevent or cure prejudice that results when statements that directly incriminate codefendants are introduced into evidence at a joint trial and the declarant is not available to testify or to be cross-examined."

United States v. Truslaw, 530 F.2d 257 ([W. Va.], 1975), 12 CLB 608.

South Carolina Defendant Alford and his codefendant were arrested for a murder committed in the course of the armed robbery of a store. The codefendant gave the police a written confession indicating

that he and a person other than defendant had committed the crime. They were tried jointly after denial of their motions for separate trial.

Alford took the stand in his own behalf and offered an alibi defense. His codefendant (whose confession had exculpated defendant), did not take the stand. The state did not offer the confession in evidence. Alford, realizing that his codefendant would invoke the Fifth Amendment, did not call him to the stand, nor did he attempt to introduce the codefendant's exculpatory statement. Both men were convicted of first degree murder and Alford appealed, asserting abuse of discretion in the denial of his motion for a separate trial.

The Supreme Court of North Carolina reversed on the authority of Chambers v. Mississippi. 410 U.S. 284 (1973), holding that while there was substantial evidence against Alford, "there is no doubt that his alibi defense was 'less persuasive' than it would have been had it been strengthened by introduction of Carter's statement or testimony. Under the circumstances of the joint trial, Alford was precluded from introducing this statement or this testimony. . . . We therefore hold that his defense was so prejudiced as to amount to a denial of due process and his right of confrontation." State v. Alford, 222 S.E. 2d 222 (1976), 12 CLB 620.

§ 8.05. Opportunity to cross-examine

"Cross-Examination of a 'Voiceprint' Expert: A Blueprint for Trial Lawyers" by David M. Siegel, 12 CLB 509 (1976).

D. SEARCH AND SEIZURE (including eavesdropping)

§ 9.01. What constitutes an arrest

"Street Patrol: The Decision to Stop a Citizen" by Robert L. Bogomolny, 12 CLB 544 (1976).

§ 9.02. Constitutionally protected areas

Court of Appeals, 8th Cir. *See* United States v. Kelly, 529 F.2d 1365 (1976), 12 CLB 608, CLD § 20.00.

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 9.03. Conflict of laws

Nebraska Defendant, an American citizen, fled to Juarez, Mexico, after shooting and killing a man in Nebraska with a .22 pistol. Some time later, he recrossed the border to El Paso, Texas, to meet his girl friend. He was promptly arrested. The El Paso police relayed a request from a Nebraska sheriff to search the defendant's Mexican residence for the pistol. The Mexican police entered the premises, found the weapon, and turned it over to the Nebraskan officer.

At defendant's ensuing trial, the gun was admitted into evidence over the defense objection of illegal search and seizure. Defendant was convicted and he appealed, relying upon Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222, wherein it was held that when the United States acts against citizens abroad, it cannot "do so free of the Bill of Rights."

The Supreme Court of Nebraska affirmed the conviction, "because Mexican authorities, rather than United States or State officers, carried out the challenged search and seizure in Mexico. . . . The mere request made . . . to the Mexican police that they search a residence in Juarez, Mexico, for a weapon used in a homicide did not convert the resulting seizure made by the Mexican authorities into a joint venture. A greater activity by the American police is required before there is a joint venture which will trigger the application of the exclusionary rule." State v. Barajas, 238 N.W.2d 913 (1976), 12 CLB 617.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 9.10. Search warrant—in general

Oklahoma An Oklahoma statute making it unlawful to "barter" or "traffic in" motion pictures depicting certain sexual acts was not applicable to defendants who operated, maintained, and made change for coin-operated viewing machines in their adult bookstore premises. The terms "barter" and "traffic in," said the court, "have the popular meaning of an exchange or passing of goods, merchandise or commodities for an equivalent in goods or money."

The court also held that the warrant to search the bookstore was constitutionally invalid (under the guidelines set down in Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789) where the issuing magistrate did not view the film in question but relied, instead, upon descriptions in the search warrant, and where the facts did not present exigent circumstances requiring immediate police action to preserve the evidence. Hess v. State, 536 P.2d 366 (Okla. Crim. App. 1975), 12 CLB 97.

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 9.15. —Sufficiency of underlying affidavit

Colorado There was a delay of five days between the time that police learned through an informant that marijuana was being sold in a certain house and the filing of an affidavit to search that house. The court held that it would not disturb the independent determination of the issuing judge that there was probable cause to believe there was marijuana in the house where, as here, there was evidence to support that finding. Suppression would be required only if the defendant could demonstrate that he suffered legal prejudice as a result of the delay. People v. Glazier, 545 P.2d 727 (Colo. App. 1975), 12 CLB 618.

New York Defendant contended, on appeal from his conviction for larceny, that the search warrant executed against him was invalid because the supporting affidavit did not meet the two-pronged *Aguilar-Spinelli* test, which requires that "the informer's reliability be demonstrated either by independent corroborative verification of his tale or by showing that the same informer previously supplied accurate information." (Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509; Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584.)

Held, "so exacting an analysis" was not appropriate to apply to the instant case because, unlike *Aguilar-Spinelli*, the affiant here was not a police officer repeating a story told to him by a "reliable" informant; instead, the information furnished the court came directly from the informer's sworn statement, "without the benefit of filtering by the police." The informer, moreover, was an identified member of the community attesting to facts he had directly observed and which were set out in detail, as was the means by which he acquired the information. People v. Hicks, 38 N.Y.2d 90, 378 N.Y.S.2d 660 (N.Y. App. 1975), 12 CLB 465.

§ 9.20. —Validity of warrant on its face

Georgia A search warrant which authorized the search of a certain commercial lounge "and all persons on the premises," for Dilaudid, cocaine, and barbiturates, was a "general warrant" as to defendant, who was a customer seated at the bar at the time of the execution of the warrant. Therefore, the trial judge erred in overruling the motion to suppress as evidence the marijuana seized from defendant in a search pursuant to the warrant. Wilson v. State, 221 S.E.2d 62 (Ga. App. 1975), 12 CLB 466.

§ 9.30. —Manner of execution

Court of Appeals, 3d Cir. The defendant in a *federal* narcotics case moved to suppress evidence obtained as a result of a *state*-issued search warrant on the ground that the printed provisions of the warrant required that it be executed "forthwith," but that it was, in fact, executed eight days later. The Third Circuit held:

> "The warrant need only satisfy federal constitutional requirements rather than those of state law, which may involve stricter standards. Thus, even if the warrant did not comply with *state* law, evidence obtained from a subsequent search and seizure would not necessarily be inadmissible in a federal criminal trial."

Timeliness of execution, said the court, "should be functionally measured in terms of whether probable cause still existed at the time the warrant was executed." Since the record revealed that there was continuing probable cause, the execution of the warrant was held to be reasonable. United States v. Bedford, 519 F.2d 650 (1975), 12 CLB 75.

Colorado The police entered defendant's premises under a search warrant permitting them to search for heroin and implements used in narcotics traffic. They discovered sixty-five balloons of heroin and three loaded guns in defendant's bedroom. Thereafter, they continued to search the rest of the apartment and found some money, a cash register, a movie projector, a tape recorder, and an adding machine – items which defendant claimed were outside the scope of the warrant. The court denied his pretrial motion to suppress all of the items seized.

Held, the entire search would only become invalid "if its general tenor was that of an exploratory search for evidence not specifically related to the search warrant." Such was not the case here, said the court. "The disputed articles were discovered during a bona fide, and successful, search for items listed in the warrant." Hence, the search was a valid search. People v. Young, 543 P.2d 1302 (Colo. App. 1975), 12 CLB 346.

§ 9.40. —Necessity of obtaining a warrant

Georgia *See* Sanders v. State, 219 S.E.2d 768 (1975), 12 CLB 345, CLD § 10.10.

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

"Warrantless Searches and the 'Plain View' Doctrine: Current Perspective" by Peter W. Lewis and Henry W. Mannle, 12 CLB 5 (1976).

§ 10.00. Search incident to a valid arrest—in general

Court of Appeals, 7th Cir. Defendant contended, inter alia, that his conviction for distributing counterfeit bills should be reversed because evidence seized during a search incident to a warrantless arrest should have been suppressed since the arresting officers had ample time to obtain a warrant.

The Seventh Circuit declined to consider whether warrantless arrests should be treated as presumptively invalid in the same manner as warrantless searches, noting that this precise issue was currently pending before the Supreme Court in United States v. Watson, 504 F.2d 849 (1974), *cert. granted* 420 U.S. 924, 95 S. Ct. 1117 (1975). United States v. Fairchild, 526 F.2d 185 (1975), 12 CLB 340.

Oregon Before going out on patrol duty, the arresting officer was briefed to be on the lookout for a vehicle that was suspected of carrying illegal drugs and persons who might be armed and dangerous. The officer spotted the automobile and followed it until defendant driver com-

mitted the minor traffic violation of failing to signal a right turn, whereupon the officer stopped the vehicle and arrested defendant. Incident to this arrest, defendant was searched and a quantity of drugs were found in a shoulder bag he was carrying.

Appealing his conviction, defendant contended that the drugs were seized from him as a result of a search that was illegal because it was incident to a pretext arrest. Defendant argued that because minor traffic infractions usually resulted in citations, rather than arrests (although either was permissible by law), and because no traffic charges were brought against him after he was arrested, the trial court erred in not holding that the arrest was merely a pretext for the search.

Sustaining the conviction, the Oregon Court of Appeals held that the evidence supported the finding that the arrest was legitimate. State v. Huss, 541 P.2d 498 (Ore. App. 1975), 12 CLB 204.

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 10.10. —Probable cause

Court of Appeals, 10th Cir. *See* United States v. Rodriguez, 525 F.2d 1313 (1975), 12 CLB 340, CLD § 14.00.

Georgia A sheriff investigating the rape-murder of a white farmer's wife discovered that of the three black employees of the farm, only defendant's whereabouts was unaccounted for at the time of the crime. The sheriff found out, moreover, that defendant owned a pair of boots capable of making the mud tracks found near the victim's house, and that the car tracks in the victim's driveway matched those of an automobile borrowed by the defendant from his brother.

Based on this information, the sheriff had defendant brought in to his office for "questioning" on Friday morning but held him continuously in custody until the following Monday, at which time a formal warrant of arrest was obtained. During the period that defendant was held in custody without a warrant, the sheriff took defendant's fingerprints and obtained his trousers, boots, and samples of his pubic and head hairs for examination. These searches produced results which tended to identify defendant as the culprit. Confronted with them, he confessed.

Sustaining the conviction, the Georgia Supreme Court held that the information in the sheriff's possession at the time defendant was taken into custody justified a finding of probable cause to arrest and search. Sanders v. State, 219 S.E.2d 768 (1975), 12 CLB 345.

New York While riding in an unmarked patrol car, a police officer observed defendant leaning against a parked vehicle, holding a stack of glassine envelopes in his hand. The officer jumped out of the car, rushed to defendant, and grabbed his wrists just as defendant, spotting the oncoming officer, "threw" the bags away.

Held, that in view of the officer's training in narcotics detection, the fact that glassine bags are "a telltale sign of heroin," and the fact that defendant had attempted to rid himself of the bags when he saw the officer approaching (thereby evincing a consciousness of guilt), the officer had probable cause to seize the bags, and the contents were admissible. People v. Alexander, 37 N.Y.2d 202, 371 N.Y.S.2d 876 (1975), 12 CLB 87.

§ 10.25. Permissible scope of incidental search

New York Police officers obtained a warrant to search the apartment and person of defendant and the apartment and person of one Lucas. Proceeding to the apartment building where Lucas lived, they observed defendant leaving the Lucas apartment and entering the building's

hallway. They approached defendant, advised him that they had a search warrant, and then searched him, recovering from his person a packet of heroin.

Held, that the doctrine of "inevitable discovery" was inapplicable in the instant situation since the only way the police could have obtained the packet from the person of the defendant (absent its abandonment by him or his voluntarily surrendering it to the police) would have been by detention of the defendant and search of his person. The search of defendant, therefore, would not have been inevitable and was "ineluctably related to his illegal detention and search by the police." People v. Green, 381 N.Y.S.2d 246 (N.Y. App. 1976), 12 CLB 618.

§ 11.00. Consent—in general

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 11.30. —Voluntariness of consent

United States Supreme Court *See* United States v. Watson, 96 S. Ct. 820 (1976), 12 CLB 451, CLD § 30.00.

§ 12.00. Stop and frisk

Court of Appeals, 5th Cir. *See* United States v. Martinez, and United States v. Peralez, 526 F.2d 954 (1976), 12 CLB 455, CLD § 14.00.

"Street Patrol: The Decision to Stop a Citizen" by Robert L. Bogomolny, 12 CLB 544 (1976).

§ 14.00. Border searches

United States Supreme Court The principles of *Almeida-Sanchez v. United States,* 431 U.S. 266, 93 S. Ct. 2535 (1973), would not be applied retroactively to invalidate searches prior to the date of that decision. Bowen v. United States, 95 S. Ct. 2569 (1975), 12 CLB 75.

United States Spreme Court The rule established in Almeida-Sanchez v. United States, 431 U.S. 266, 93 S. Ct. 2535 (1973) —that absent a warrant or probable cause, "roving" border patrol units could not search vehicles at points which were removed from the border or from its "functional equivalents"—was extended to include stationary traffic checkpoints that are similarly removed from the border or its functional equivalents. United States v. Ortiz, Brignoni-Ponce, 95 S. Ct. 2585, 2590 (1975), 12 CLB 74.

Court of Appeals, 5th Cir. The defendant Martinez, who was stopped at a traffic checkpoint, was required to open a box that was in the back of his pickup truck, although there was nothing to give rise to probable cause. After his motion to suppress the marijuana found in the box was denied, he was convincted of possession with intent to distribute. Subsequently, the Supreme Court held in United States v. Ortiz, 422 U.S. 891, 95 S. Ct. 2585 (1975), that probable cause or consent is required for vehicular searches at "traffic checkpoints removed from the border and its functional equivalents." The Fifth Circuit applied *Ortiz* and reversed defendant's conviction.

In denying the petition for rehearing, the court rejected the government's contention that the extension of the rule in United States v. Almeida-Sanchez, 413 U.S. 266, 93 S. Ct. 2535 (1973), applied to checkpoint searches for the first time in *Ortiz,* should not be given retrospective application, saying:

> "*Ortiz* did not establish a new rule in an *overruling decision*. . . . On the contrary the Court took pains to point out that it was following *Chambers v. Maroney,* 1970, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed.2d 419, and *Almeida-Sanchez.*"

With respect to the second case, which involved an investigatory stop by roving patrol agents who had no reason to believe that the defendant had come from

the border or that he was violating any law, the court held that *Almeida-Sanchez* was applicable, and that United States v. Brignoni-Ponce, 422 U.S. 973, 95 S. Ct. 2574 (1975), which held that a *stop* could only be justified upon the basis of reasonable suspicion, should be retrospectively applied to defendant. United States v. Martinez, and United States v. Peralez, 526 F.2d 954 ([Tex.] 1976), 12 CLB 455.

Court of Appeals, 10th Cir. Defendant purchased a ticket in Laredo, Texas, on a commercially operated van-type bus going to Illinois. His suitcase was loaded into the U-Haul trailer attached to the bus. En route, the bus was stopped at a toll station by a border patrol agent who had probable cause to believe that some 300 pounds of marijuana were concealed in the U-Haul trailer. Finding the marijuana hidden in the U-Haul trailer under a tarpaulin, the patrol agent arrested the bus driver for possession of the marijuana, and called for assistance. The agent then proceeded to order the passengers to go to the rear of the trailer and identify and open their luggage. Defendant's suitcase was found to contain 25 pounds of heroin.

The court held that the agents lacked probable cause to search defendant's suitcase. There was nothing to connect defendant or any other passenger with the marijuana found in the trailer. The "mere fact that [defendant's] suitcase, along with other luggage of the passengers, was in the trailer in near proximity to the gunny sacks of marijuana is in our view insufficient to establish probable cause to believe that there was also marijuana in the passengers' luggage. One does not follow the other. Absent probable cause, then, the border patrol agents had no authority to search [defendant's] suitcase." United States v. Rodriguez, 525 F.2d 1313 (1975), 12 CLB 340.

§ 14.10. Plain view (See also § 9.00.)

New York *See* People v. Ruggieri, 379 N.Y.S.2d 333 (Sup. Ct. 1976), 12 CLB 464, CLD § 15.00.

"Warrantless Searches and the 'Plain View' Doctrine: Current Perspective" by Peter W. Lewis and Henry W. Mannle, 12 CLB 5 (1976).

§ 15.00. Official governmental inspection

New York Five police officers entered the junkyard of a licensed dealer. Despite the claim that it was a routine inspection, the visit was actually scheduled to check out a tip and previous confirming observations that the operators were receiving and scrapping stolen vehicles. Accordingly, shortly after entering, the officers "began to roam in a limited area not in excess of 12 feet from the shed [serving as a business office], looking at the automobile parts spread about them." This perusal disclosed car parts and motors with obliterated identification numbers, some of which the police later established to be from cars that had been reported stolen. Defendants moved to suppress the evidence seized, asserting that the police, under the guise of a routine administrative inquiry, actually conducted a warrantless and illegal search.

The search of the licensed junkyard must be sustained, said the court. The traffic in stolen cars and their parts is a concern of society and the proper subject for regulation. While the pertinent provisions of New York's Administrative Code did not specifically authorize inspection of the premises, they did "authorize entry upon the premises to inspect the 'record of purchases' which must be maintained." The entry "was not a random intrusion, but rather a response to a well-founded suspicion that operations at the yard were in violation of law." Moreover, notwithstanding the fact that the owner did not keep the required records, "the officers did not at any time engage in any ex-

ploratory search of the premises. The property examined and seized was either in the shed or within 12 feet of it, in open view from the vantage of the shed."

Furthermore, the premises were open for business and accessible to the public, including the shed and the area surrounding it. Accordingly, "police inquiry so limited did not constitute any intrusion upon the privacy of the corporate owner of the junkyard or its management personnel." People v. Ruggieri, 379 N.Y.S.2d 333 (Sup. Ct. 1976), 12 CLB 464.

§ 16.00. Automobile searches

United States Supreme Court Texas police officers arrested defendant as he sat in his car while attempting to pass fraudulent checks at the drive-in window of a bank. The officers also had information that a person answering to defendant's description and driving a matching car had a short while earlier attempted to pass several fraudulent checks at another local bank. Although one of the arresting officers observed the defendant attempting to stuff something between the seats of his car, no search of the car was made at this time. Instead, defendant and his car were taken to the station house where defendant was questioned for 30 to 45 minutes before the police, without his consent, conducted a warrantless search of the car. The search produced four wrinkled checks corresponding to the ones defendant had attempted to pass at the first bank.

The trial judge, relying on Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975 (1970), admitted over defendant's objection the seized checks, expressly finding that the officers had probable cause both for the arrest and for the search of the vehicle, either at the scene or at the station house. The Texas Court of Criminal Appeals reversed.

In a brief *per curiam* opinion, the United States Supreme Court reversed, six to two (Marshall and Brennan, J.J., dissenting).

Chambers v. Maroney held, said the Court, "that police officers with probable cause to search an automobile on the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant. There, as here, 'the probable cause factor' that developed on the scene 'still obtained at the station house.'" Texas v. White, 96 S. Ct. 304 (1975), 12 CLB 333.

Oregon *See* State v. Huss, 541 P.2d 498 (Ore. App. 1975), 12 CLB 204, CLD § 10.00.

"Warrantless Searches and the 'Plain View' Doctrine: Current Perspective" by Peter W. Lewis and Henry W. Mannle, 12 CLB 5 (1976).

Pennsylvania Police received confidential information that a certain described vehicle was transporting heroin between two localities. The information was put out over the police teletype. Officers, acting upon this information, stopped defendant's vehicle and observed glassine bags containing heroin.

Held, in reversing the conviction, that "since there was nothing to show the information to be reliable, the police had not established probable cause to stop the automobile." The information the officers received by teletype, without more, did not establish the necessary probable cause. Hence, the stop was constitutionally impermissible, and the "fruits" of the unlawful seizure should have been suppressed. Commonwealth v Boyer, 345 A.2d 187 (1975), 12 CLB 203.

§ 18.00. Exigent circumstances

New York A police officer, responding to a call that there was a "suspicious male" on a certain public street, observed the defendant who appeared to be dishev-

eled and staggering about unsteadily. The officer approached, stopped the defendant, and asked him if there was anything wrong and if he needed help. Defendant responded incoherently and nearly fell down. The officer, noticing that defendant was carrying a torn paper bag in which could be seen several colored bottles (but not their contents), took the bag away from defendant, looked into it, and confirmed that the bottles contained pills and capsules. "Almost contemporaneous" with that event, a radio call came in reporting a burglary of a nearby pharmacy from which a quantity of pills in bottles had been stolen. Defendant was taken into custody and brought to the pharmacy, whereupon he was arrested.

The judge hearing the motion to suppress denied on the ground that defendant's observed physical and mental state and his irrational behavior justified the officer's taking "emergency" action to determine the cause of defendant's condition in order to render effective assistance. The judge purported to find a nationally "pervasive" application of the doctrine. "The conclusion is thus evident that the 'emergency doctrine' is one of the *exceptions* engrafted to the general rule. . . . The search did not violate defendant's constitutional rights under the Fourth Amendment." People v. Rinaldl (Bronx County Sup. Ct.) (N.Y.L.J., Oct. 9, 1975), 12 CLB 86.

MOTIONS TO SUPPRESS

§ 20.00. Standing

Court of Appeals, 8th Cir. A United Parcel Service (UPS) official, noticing that a carton of goods destined for defendant adult bookstore owner was ripped open, examined the contents closely, found them to be salacious, and promptly notified the FBI. An FBI agent seized some of the books and permitted the remainder to proceed to their destination. On several occasions thereafter, the same UPS official, again "noticing" other cartons addressed to defendant similarly lying about ripped open, continued to inform the FBI. On one such occasion, FBI agents secretly marked some books and magazines, then allowed them to proceed to the defendant's store, where they were later purchased by an agent.

Charged with interstate transportation of obscene matter, defendant moved unsuccessfully to suppress the books and magazines. He was subsequently convicted.

The Eighth Circuit reversed. The court rejected the government's contention that defendant had no standing to contest the search and seizures since defendant was not on the UPS premises at the time of the seizures, and was not charged with any offense in which *possession* of the seized items was an element of the crime, and since he had no proprietary or possessory interest in the premises.

The court pointed out that defendant was the victim of the government's investigation and the one against whom the search was directed. The fact that the books were consigned to him established "more than a proprietary interest." Additionally, the right to a reasonable expectation of privacy, said the court, extends to *objects* as well as places.

Moreover, it was contradictory, said the court, for the government to assert defendant's dominion and control over interstate shipments of purportedly obscene books at the time of their seizure while contending that he lacked a sufficient interest to challenge the search and seizure of the same materials.

In the absence of exigent circumstances, said the court, "seizure of First Amendment materials should observe traditional constitutional safeguards and allow a judge to focus searchingly on the question of obscenity." United States v. Kelly, 529 F.2d 1365 (1976), 12 CLB 608.

§ 21.10. The evidentiary hearing —burden of proof

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 21.25. —Disputed evidence on admissibility—duty of judge to resolve

Minnesota The key issue at the pretrial suppression hearing was whether the marijuana was seized incident to a lawful search made at the time of the arrest, or whether it was taken without a search warrant after defendant had been taken into custody.

The trial court declined to resolve the fact question thus raised, and refused to suppress the evidence, saying: "I am going to deny the motion to quash, regardless of credibility. That's what we have juries for."

Reversing the conviction, the Minnesota Supreme Court held:

> "Clearly, it was the duty of the trial court to withhold the evidence from the jury unless the trial court made findings of fact on the disputed evidence which would render the marijuana admissible."

State v. Davis, 233 N.W.2d 561 (1975), 12 CLB 205.

§ 21.30. —Right to hearing on truth of allegations in supporting affidavits

Court of Appeals, 3d Cir. Petillo moved to suppress the evidence obtained by execution of a search warrant against him on the ground that the police affidavit upon which it had been secured was perjurious.

The affidavit had alleged, inter alia, that on a certain date a number of bets had been placed with him by the police by calling a certain telephone number. Petillo sought to demonstrate that this allegation was false by producing testimony of a telephone company representative to the effect that on the date in question, the telephone number had not yet been assigned to Petillo. Despite this, the state court denied the motion, holding that either the affidavit contained no falsehoods or, if there were falsehoods in respect of the telephone calls, the remainder of the affidavit (which, in part, was derived from an informant) justified a finding of probable cause. Petillo commenced a proceeding in federal court for a writ of habeas corpus, claiming deprivation of a federally guaranteed right to be secure against unreasonable searches and seizures.

A Third Circuit district judge, granting the writ, held that petitioners had been deprived of due process of law. The trial court had committed error of constitutional dimension by holding that even if there were falsehoods in the affidavit regarding the telephone calls, the remaining portions of the affidavit were sufficient for a finding of probable cause. On the contrary, "the decision on the credibility of the remainder would itself turn on the accuracy, and the *honesty*, of the challenged portion." Said the court: "When a defendant introduced substantial evidence from an authoritative and independent source which directly contradicts some of the material allegations of the affidavit, the trier must face and resolve the dispute." United States *ex rei.* Petillo, Civ. Action Nos. 1252-73, 1808-73 (N.Y. L.J., Oct. 23, 1975), 12 CLB 86.

FRUITS OF THE POISONOUS TREE

§ 22.00. Exclusion of evidence as fruit of the poisonous tree

Pennsylvania *See* Commonwealth v. Boyer, 345 A.2d 187 (1975), 12 CLB 203, CLD § 16.00. *See also* Commonwealth v.

Sams, 350 A.2d 788 (1976), 12 CLB 466, CLD § 30.03.

§ 22.20. Illegally seized evidence admissible

Michigan Two years after the commission of a robbery-murder, the police, using the pretext of defective lights, stopped defendant's car and searched it. The search produced a pistol which ballistics tests linked to the commission of the murder. As a result of the foregoing, defendant was placed in a lineup where he was identified by an eyewitness as one of the perpetrators of the felony-murder.

On defense motion, the trial court held that the search had been pursuant to an illegal arrest and consequently ordered that the pistol be suppressed from evidence. Defendant was convicted, and he appealed.

The Michigan Court of Appeals affirmed the conviction. Said the court:

"The question which must be asked is whether the evidence has been procured by an exploitation of the illegality of the police or instead by means sufficiently distinguishable to be purged of the primary taint. . . . In the instant case an illegal police search produced firearms. At the time of the search, the officers had no knowledge that defendant Watkins was in any way connected with the murder of decedent some months earlier. A routine ballistics check on the firearm showed that it could have been the murder weapon. This prompted the police to call witnesses to attend a lineup to determine if they could identify Watkins as the felon. This in turn resulted in the out-of-court identification. We hold that the arresting police officers could not possibly have foreseen the causal sequence involved, and thus that the 'fruit of the poisonous tree' doctrine is inapplicable." People v. Jones, 238 N.W.2d 813 (Mich. App. 1976), 12 CLB 619.

ELECTRONIC EAVESDROPPING

§ 22.50. Electronic eavesdropping —in general

New York *See* Santangello v. People (N.Y. App. Div. 1st Dep't, Oct. 23, 1975) (N.Y.L.J., Nov. 3, 1975), 12 CLB 100, CLD § 33.73.

§ 22.55. —Consent of one of parties to telephone conversation

Court of Appeals, 7th Cir. Defendant moved to suppress five tape-recorded telephone conversations with an accomplice who was acting as a government agent, arguing that they were improper and inadmissible because the government informant had not given his voluntary consent. The Seventh Circuit distinguished the cases cited by defendant in support as involving "situations where the party's consent could be seriously questioned either because of incapacity or government pressure."

In the present case, however, the facts belied the contention that the agent's consent was involuntary, said the court. He had not received "promises" of leniency or of a change in location and new identity, and had not received any compensation for his cooperation. Moreover, the trial court "was made aware of executed advice of rights and consent to monitor forms, personally executed by [the agent] before each conversation." Concluded the court: "We fully realize that [the agent's] cooperation stemmed from the fact that he believed he would receive a better deal from the government. Yet that fact alone does not vitiate his consent or indicate that his actions were the product of government control." United States v. Bastone, 526 F.2d 971 ([Ill.] 1975), 12 CLB 458.

§ 22.62. —Procedure for suppressing fruits of eavesdropping

Court of Appeals, 9th Cir. *See* United States v. Spagnuolo, 12 CLB 76, CLD § 35.15.

E. SELF-INCRIMINATION

NONTESTIMONIAL ASPECTS

§ 23.00. Silence as an admission

Pennsylvania *See* Commonwealth v. Greio, 350 A.2d 826 (1976), 12 CLB 476, CLD § 2.35.

§ 23.25. Other physical characteristics

"Cross-Examination of a 'Voiceprint' Expert: A Blueprint for Trial Lawyers" by David M. Siegel, 12 CLB 509 (1976).

§ 23.45. Drunk driving tests

Louisiana *See* State v. Jones, 316 So. 2d 100 (1975), 12 CLB 96, CLD § 47.00.

New York A New York district court held unconstitutional a statute that imposed a penalty for refusal of a motorist involved in an accident or traffic violation to take a breath test at the request of a police officer.

The court held that the obligation to take the breath test created a "hazard of self-incrimination," which was "real and appreciable." Since the sole purpose of the test was to assist the officer in making a determination as to whether he was going to arrest the defendant, "consequently the sole and only function is to incriminate the motorist," said the court.

In holding that the statute's imposition of a penalty for failure to take the breath test violated defendant's Fifth Amendment rights, the court distinguished the chemical test statute, which had been held constitutional and under which a motorist refusing to take a chemical test is not charged with any violation of law. People v. Delaney, 373 N.Y.S.2d 477 (Nassau County Dist. Ct. 1975), 12 CLB 203.

OTHER ASPECTS

§ 23.80. Right of defendant to refuse to submit to examination by state psychiatrist where defense is insanity

Court of Appeals, 9th Cir. *See* Karstetter v. Cardwell, 526 F.2d 144 (1976), 12 CLB 456, CLD § 45.39.

§ 23.85. Testimony before grand jury pursuant to subpoena

Court of Appeals, 8th Cir. Three members of an Indian tribe who were found in civil contempt for refusal to give testimony before a federal grand jury investigating the deaths of two FBI agents and an Indian resident on Pine Ridge Reservation maintained on appeal that the grant of "use" immunity was inadequate to protect them from use of their grand jury testimony in any subsequent tribal court prosecutions that might arise.

Affirming the finding of civil contempt, the court held, first, that the Indian Civil Rights Act (25 U.S.C. § 1302(4)) "expressly protects an Indian from self-incrimination. Second, the testimony of a witness before a federal grand jury is protected by an obligation of secrecy under court supervision. . . . Third, and . . . decisive of the question, we think this issue has been prematurely raised. The record is silent on any pending or threatened prosecution of the [defendants] by any tribal court." Concluded the court:

> "The power of a federal grand jury to compel testimony cannot be circumscribed by the speculative uses to which such testimony may subsequently be put by another sovereignty not subject to the commands of the Fifth Amendment."

In re Long Visitor, 523 F.2d 443 (1975), 12 CLB 198.

Louisiana The mayor of a city was subpoenaed to testify before a grand jury investigating public fraud and bribery. Before defendant testified, the district attorney explained his rights to him. After

advising him that he was a "prospective defendant," the district attorney said:

> "We are asking everybody to read and attempt to understand the privilege against self-incrimination and having understood we are requesting you to waive that privilege. This privilege means simply that if you desire you can elect to claim the privilege not to incriminate yourself granted both by the State and the Federal Constitution, and that will simply mean that we are not free to ask you any questions or you do not have to answer anything in here. Of course if you waive it anything that you may say in here can be used against you and with that understanding we would then ask you if you want to testify or make a statement in here to us, if so, then you can sign that waiver."

Subsequently charged under a bill of information with public bribery, defendant moved for invalidation of the information on the ground that it violated his constitutional rights.

The Louisiana Supreme Court held that it was clear from the above that defendant had not testified under compulsion but that he had voluntarily elected to testify, notwithstanding his compulsory appearance under a subpoena. State v. Nattin, 316 So. 2d 115 (1975), 12 CLB 98.

"Policy and Procedure in the Investigation and Prosecution of Government Officials," 12 CLB 26 (1976).

§ 23.89. Accountant's clients' records

"Self-Incrimination in White-Collar Fraud Investigations: A Practical Approach for Lawyers" by Edward Brodsky, 12 CLB 125 (1976).

§ 23.89.5 Tax returns

United States Supreme Court At defendant's federal trial on gambling conspiracy charges, the government, over his Fifth Amendment objection, offered to introduce income tax returns on which he had reported his occupation as that of a "professional gambler" and on which he had reported substantial income from gambling or wagering, to help rebut his claim that his relationships with other conspirators were innocent ones by demonstrating his familiarity with the business of wagering and gambling. Defendant appealed, contending that the privilege against compulsory self-incrimination entitled him to exclude the tax returns despite his failure to claim the privilege on the returns instead of making disclosures.

Since defendant made incriminating disclosures on his tax returns, instead of claiming the privilege, as he had the right to do, his disclosures were not compelled incriminations. Defendant had a "free choice to admit, to deny, or to refuse to answer." Since there was no factor depriving defendant of the free choice to refuse to answer, the general rule applied that if a witness does not claim the privilege, his disclosures will not be considered as having been "compelled." Garner v. United States, 96 S. Ct. 1178 (1976), 12 CLB 124.

§ 23.92. Basis for asserting privelege

Michigan In 1970, defendant, who had pled guilty to second-degree murder and was sentenced, was brought to the trial of Chappel and was called as a defense witness. His testimony inculpated himself while exculpating Chappel. In 1973, defendant filed a delayed application for leave to appeal, resulting in a peremptory order reversing defendant's conviction based on an impropriety in the plea-taking process.

A second trial was held, and defendant was convicted by a jury, whereupon he appealed on the ground that the trial court had committed reversible error in allowing the prosecution to introduce the incriminating testimonial record made by

defendant as a witness in the Chappel trial.

Held, defendant's assertion at his trial of his privilege against self-incrimination did not preclude the admission as substantive evidence of voluntary statements made by defendant at the Chappel trial.

Rejecting defendant's first contention, the court noted that since defendant had failed to claim the privilege, it was not necessary to consider whether there was a knowing and intelligent waiver of the privilege. "The privilege must be claimed before the issue of knowing and intelligent waiver arises," said the court.

Defendant's second contention (for which he relied on United States v. Miranti, 253 F.2d 135 (2d Cir. 1958)), was also rejected:

> "Defendant misconstrues *Miranti, supra,* which stands for the proposition that a witness who testifies in one proceeding does not waive the assertion of his privilege against self-incrimination in a second proceeding. In other words, the witness cannot be forced to testify in the second proceeding based on the waiver in the first proceeding. However, the assertion of the privilege in the second proceeding does not preclude the admission into evidence of voluntary statements made by the witness in the prior proceeding."

People v. Hunley, 234 N.W.2d 169 (Mich. App. 1975), 12 CLB 201.

"Self-Incrimination in White-Collar Fraud Investigations: A Practical Approach for Lawyers" by Edward Brodsky, 12 CLB 125 (1976).

§ 23.98. Retroactivity of constitutional rulings

United States Supreme Court *See* Bowen v. United States, 95 S. Ct. 2569 (1975), 12 CLB 75, CLD § 14.00.

Court of Appeals, D.C. Cir. *See* United States v. Sherpix. Inc., 512 F.2d 1361 (1975), 12 CLB 79, CLD § 81.10.

F. SPEEDY TRIAL

§ 24.02. Cause of delay

California California's speedy trial statute requires that a defendant be brought to trial within sixty days after the filing of an accusatory pleading, unless he *expressly or impliedly consents* to further delay or causes such delay. The overloaded assistant public defender assigned to the case obtained a series of continuances which carried the matter beyond the sixty-day statutory period. Defendant not only did not consent to these extensions, but repeatedly brought to the court's attention his refusal to "waive time," pointing out that he had been in custody beyond sixty days and demanded to be released or tried.

The court ruled that the consent of defendant's counsel to the various extensions of time, against defendant's expressed will, were nevertheless binding upon defendant. In holding that consent of counsel alone satisfied the statute, the court noted that it was "well established that the power to control judicial proceedings is vested exclusively in counsel." While it was true that there were certain fundamental constitutional rights which counsel may not waive without his client's consent, said the court, "the *statutory* right to be tried within sixty days . . . cannot properly be termed 'fundamental' . . . and therefore beyond counsel's primary control." Townsend v. Superior Court of Los Angeles County, 126 Cal. Rptr. 251, 543 P.2d 619 (1975), 12 CLB 347.

Illinois Defendant was charged with sexual offenses involving a child. He subsequently moved for discharge on the ground that more than 120 days had elapsed—the period mandated by statute—between his arrest and the time of trial. The state argued that the statutory period had been tolled during the time that defendant underwent the psychiatric examinations statutorily required in cases in-

solving sex offenses upon a child. The state contended that the speedy trial statute expressly provides that the statute is tolled "by an examination for competency."

Held, in affirming the discharge of defendant, the psychiatric testing requirement could not be regarded as an examination to determine competency. People v. Leonard, 341 N.E.2d 141 (Ill. App. 1976), 12 CLB 467.

"An Analysis of Standards for Criminal Justice Structure and Organization" by Daniel L. Skoler, 12 CLB 410 (1976).

§ 24.05. Computation of delay

United States Supreme Court Twenty-two months elapsed between defendant's arrest and indictment, and a further period of twelve months between his indictment and trial. Defendant's motion to dismiss the indictment on the ground he had been denied a speedy trial in violation of the Sixth Amendment was denied, and the Court of Appeals for the Fifth Circuit affirmed, holding that under United States v. Marion, 404 U.S. 307, 92 S. Ct. 455 (1971), the twenty-two-month preindictment delay was not to be counted for the purposes of a Sixth Amendment motion absent a showing of actual prejudice.

Held, "this reading of *Marion* was incorrect." The government in the instant case constituted defendant an "accused" when it arrested him and thereby commenced its prosecution of him. *Marion,* said the Court, made this clear when it held

> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge."

The judgment of the Court of Appeals was reversed in a *per curiam* opinion (Burger, C.J., dissenting). Dillingham v. United States, 96 S. Ct. 303 (1975), 12 CLB 334.

Florida Florida's speedy trial rule requires the discharge of defendants who have not been brought to trial within ninety days of having been "taken into custody." At issue in the instant case was whether defendants, who had not been formally "arrested," but who had been served with summonses to appear in court, had been "taken into custody" for speedy trial purposes at the time the summonses were served.

Held, defendants were deemed to have been "taken into custody" when they were served with the summonses. Said the court: "We see no reason why a person served pursuant to *Fla. Stat.* 901.09(2) with a summons, as contrasted with an arrest pursuant to a warrant, should not likewise be considered as being 'in custody' within the meaning of the speedy trial rule." Singletary v. State, 322 So. 2d 551 (1975), 12 CLB 347.

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

G. IDENTIFICATION PROCEEDINGS

§ 25.00. Right to counsel (See also § 5.00.)

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 25.03. Suggestiveness of identification procedure

Illinois A state trooper gave chase to two men whom he observed attempting to break into a commercial building in the nighttime. One of them was apprehended a short time later while trying to leave the area in a truck. The truck bore a person's name on its side which was other than that of the man arrested. The officer requested the county police department to show him a photograph of the person

whose name appeared on the truck. Defendant's photograph was supplied and the officer identified him as the other participant in the attempted burglary.

Reversing a conviction, the court held that the use of a single photograph by the state trooper was "unnecessarily suggestive." Said the court:

> "Clearly, the police could easily have added several police photographs to the one shown the trooper. That [defendant's] name was printed on the truck in which a participant of the offense was found would very likely predispose the trooper to identify the single photograph of [defendant] . . . especially in light of the weak evidence surrounding the initial identification."

The court then went on to hold that under the circumstances obtaining at the scene of crime, there was an insufficient independent basis for the in-court identification. People v. Allender, 342 N.E.2d 284 (Ill. App. 1975), 12 CLB 619.

§ 25.30. Prior identification as affecting testimony

Illinois *See* People v. Allender, 342 N.E.2d 284 (Ill. App. 1975), 12 CLB 619, CLD § 25.03.

PART II – THE CRIMINAL PROCEEDING – FROM ARREST TO APPEAL

A. THE INITIAL STAGES

§ 30.00. Arrest

Florida A police officer from one city, while working undercover, effectuated an arrest in another city. *Held*, in sustaining the arrest, that while the officer would have lacked jurisdiction to make the arrest if he had been acting "under the color of his office," the fact that he was out of uniform and representing himself to be a private citizen at the time he made the narcotics purchase, put him in the same position as a private citizen who has a right to make a citizen's arrest for a felony committed in his presence. State v. Crum, 323 So. 2d 673 (Fla. App. 1975), 12 CLB 346.

United States Supreme Court By statute (18 U.S.C. § 3061(a)), postal inspectors are authorized to make warrantless arrests provided they have reasonable grounds to believe felonies have been committed. In the instant case, postal officers, acting upon probable cause supplied by a reliable informant, effected a warrantless arrest of defendant in a restaurant for stolen credit cards. When a search of defendant's person revealed no cards, the inspector asked if he could look inside defendant's car, which was standing within view, cautioning defendant that if anything were to be found, it would be used against him. Defendant responded. "Go ahead." The search uncovered two stolen credit cards. Defendant was convicted of possessing stolen mail, and he appealed.

The Court held that the warrantless arrest did not violate the Fourth Amendment and, consequently, defendant's consent to the search of his car was not the product of an illegal arrest. Since there was probable cause to believe that defendant had violated 18 U.S.C. § 1708 (punishing theft as well as possession of stolen mail), the postal officers, in arresting defendant, were acting strictly in accordance with the governing statute (18 U.S.C. § 3061(a)) authorizing them to arrest without a warrant.

According to the Court, Section 3061 represented a judgment by Congress that "it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so." Moreover, said the Court,

"there is nothing in the Court's prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony. Indeed, the relevant prior decisions are uniformly to the contrary. . . .

"Congress has plainly decided against conditioning warrantless arrest power on proof of exigent circumstances. Law enforcement officers may find it wise to seek arrest warrants where practicable to do so. . . . But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like."

The Court then proceeded to find that the factors relied upon to invalidate the consent were inadequate, noting that there had been no overt act or threat of force against defendant, and no promises or more subtle forms of coercion. Although defendant had been arrested and was in custody, said the Court,

"the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, . . . the absence of proof that [defendant] knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance. There is no indication in this record that [defendant] was a newcomer to the law, mentally deficient or unable in the face of a custodial arrest to exercise a free choice. He was given *Miranda* warnings and was further cautioned that the results of the search of his car could be used against him. He persisted in his consent.

"In these circumstances, to hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth* [v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2401 (1973)] and would distort the voluntariness standard that we reaffirmed in that case."

Mr. Justice Stewart, concurring, noted that the Court did not decide, nor could it here, "whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest."

Justices Marshall and Brennan, dissenting, were of the view that the majority had not decided the case on the narrow question it presented. They argued that defendant's warrantless arrest was valid under the recognized exigent circumstances exception, and that the majority thus had no occasion to consider whether a warrant would otherwise be necessary.

Considering the majority's two-part analysis of a warrant test, the dissent concluded that far from being unduly burdensome, an arrest warrant requirement might, in fact, be less burdensome than the search warrant rule; and that the significant protection of the "privacy of our citizens" which would be gained from a warrant requirement dictated that a warrant rule be imposed.

With respect to the issue of consent, the dissent said that the majority, without acknowledgment or analysis, had extended the scope of *Schneckloth* and created a rule inconsistent with that case's own analysis. The lack of custody, argued the dissent, was of decisional importance in *Schneckloth*, which repeatedly distinguished the case before it from one involving a suspect in custody. Custodial interrogation is inherently coercive, said the dissent, and any consent thereby obtained is necessarily suspect. United States v. Watson, 96 S. Ct. 820 (1976), 12 CLB 451.

§ 30.03. Probable cause to arrest

Pennsylvania A police officer, who received radio calls that a gang fight and stabbing had occurred and that black males were involved and were fleeing the scene, saw defendant running a block and a half away, and stopped him for questioning. According to the officer, defendant appeared to be under sixteen years of age and he therefore ordered him into the patrol wagon for violation of a curfew law then in effect. Defendant was taken to police headquarters, questioned, and subsequently confessed. Found guilty of murder and sentenced to life imprisonment, defendant appealed.

The Supreme Court of Pennsylvania reversed, noting that the officer had no description of defendant or his clothing, and that all he knew was that "Negro males" were fleeing the scene of a gang killing. Under these facts, the officer was not justified in his belief that defendant was the perpetrator; hence, defendant was arrested without probable cause.

Moreover, the court found that defendant's confession was the product of the illegal arrest, considering defendant's age and the lack of adult guidance in his waiver of his rights. Commonwealth v. Sams, 350 A.2d 788 (1976), 12 CLB 466.

"Street Patrol: The Decision to Stop a Citizen" by Robert L. Bogomolny, 12 CLB 544 (1976).

§ 33.00. Arraignment and preliminary hearing

North Carolina Failure of the record to show the arraignment of defendant did not justify the reversal of his conviction where there was no prejudice shown and defendant was fully aware of the charge against him. Defendant's trial was a completely adversary proceeding; he was tried as if he had been arraigned, and he had entered a plea of not guilty. "In such case, the absence of formal arraignment does not constitute reversible error." State v. McCotter, 217 S.E.2d 525 (1975), 12 CLB 88.

§ 33.60. Grand jury proceedings

Court of Appeals, 7th Cir. Under 28 U.S.C. § 515(a), the Attorney General may appoint a special attorney to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States attorneys are authorized by law to conduct."

The question raised in the instant two cases was whether indictments must be invalidated because the letters of authority from the Attorney General directing the "special attorney" to investigate and prosecute were too broad under the statute, resulting in the presence of an unauthorized person before the grand jury. Noting that the statute had been construed broadly in a series of cases, the court held that the letters of authority were not too broad and that they need not specify the particular statutes under which the proceedings were to be conducted or the reasons why they were of such importance that a specially qualified attorney was required. Infelice v. United States, 528 F.2d 204 [Wis.] 1975, 12 CLB 609.

Arizona A convicted defendant maintained that the trial court's statement to the grand jury that if they could not agree, they "probably should ask for more evidence," was prejudicial because the assumption that there was more evidence would, by itself, encourage the return of an indictment. Although the appellate court agreed that the remark was improper, it held that it had not resulted in any prejudice to defendant since the grand jury had, in fact, not asked for more evidence. State v. Hocker, 541 P.2d 419 (Ariz. App. 1975), 12 CLB 213.

New York A New York statute provides that where it is necessary or appropriate, "the court or the district attorney, or both, must instruct the jury concerning the law

with respect to its duties or any matters before it, and such instructions must be recorded in the minutes."

In the instant case, the grand jury handed down a nine-count indictment against the executor-attorney of a decedent's estate charging, in connection with that estate, nine counts of larceny, perjury, and forgery. The assistant district attorney's instruction to the grand jury had consisted of little more than a setting forth of the charges in count form – which the grand jury proceeded to adopt.

Granting defendant's motion to dismiss the indictment with leave to resubmit to another grand jury, the court held that the "standard to be met by petit jury instructions, that they contain 'an adequate statement of the law to guide the jury's determination,' . . . applies with equal force to grand jury instructions." The court found that the district attorney's failure to instruct was not a mere irregularity or harmless procedural defect, but a "substantive prejudicial denial of due process rendering the grand jury proceedings defective." People v. Mackey, 371 N.Y.S.2d 559 (Suffolk County Ct. 1975), 12 CLB 99.

§ 33.73. —Immunity

Court of Appeals, 1st Cir. Defendant refused to testify before a grand jury investigating his alleged purchase in the United States of firearms which were later found in Ireland, asserting that the conferred immunity could not protect him from prosecution by Great Britain on the basis of his testimony.

Held, defendant failed to show any real or substantial danger of foreign prosecution. The questions put to him focused upon activities within the United States, and he did not assert that his answers might disclose that he engaged in compromising conduct while on British soil and subject to British criminal jurisdiction. *In re* Quinn, 525 F.2d 222 (1975), 12 CLB 342.

New York New York has held, in a prior case, that notwithstanding a grant of immunity, a grand jury witness may not be compelled to answer questions which are the product of an illegal electronic surveillance.

In the instant case, the information which caused this witness to be called before a state grand jury came to the special prosecutor from the office of the United States Attorney for the Southern District of New York. The special prosecutor, asserting that none of the questions asked of the witness were the result of a state surveillance, refused to inquire of federal authorities – despite the witness's claim of illegal *federal* electronic surveillance – whether the witness's claim was valid or not, taking the position that since the federal government was "an entire different entity," the state was not under any obligation to do so.

Held, that "in view of the Federal Government's role in causing the State Grand Jury's investigation and the showing made by petitioner and in the interests of fairness, the prosecutor should make the requested inquiry of the Federal Authorities." Santangello v. People (App. Div. 1st Dep't, Oct. 23, 1975) (N.Y.L.J., Nov. 3, 1975), 12 CLB 100.

"Policy and Procedure in the Investigation and Prosecution of Government Officials," 12 CLB 26 (1976).

B. PRETRIAL PROCEEDINGS

PRETRIAL MOTIONS

§ 34.20. Motions addressed to indictment or information—sufficiency of indictment

Court of Appeals, 2d Cir. *See* United States v. Bermudez, 526 F.2d 89 (1975), 12 CLB 341, CLD § 82.70.

Pennsylvania Pennsylvania law relating to the sufficiency of indictments provides that where the precise date of the charged

offense is not known, *"an allegation that it was committed on or about any date* within the period fixed by the statute of limitations shall be sufficient." In the instant case, the indictment alleged that the offenses were committed within a specified eighteen-month period. Defendant was convicted and raised the issue on appeal.

Although the court found that the Commonwealth could, without difficulty, have narrowed the eighteen-month time span to a three-month period, the court sustained the conviction "under the circumstances of the instant case." Defendant, it was pointed out, had not demonstrated any resultant prejudice in the preparation of his defense. Nor had he contended that the time of the offense was an essential element thereof. Commonwealth v. Yon, 341 A.2d 169 (Pa. Super. 1975), 12 CLB 89.

Texas *See* Pittman v. State, 532 S.W.2d 97 (Tex. Crim. App. 1976), 12 CLB 474, CLD § 81.34.

Texas Defendant was charged with "burglary of a habitation with intent to commit injury to a child." The offense of burglary is defined by the penal code as entering, without consent, "with the intent to commit a felony or theft." Another provision makes it a felony to intentionally cause serious injury to a child who is fourteen years of age or younger.

Defendant maintained that the indictment was fundamentally defective because (1) it failed to allege with particularity that entry was made with intent to commit a felony and (2) it failed to set out the age and name of the child.

Held, although the better practice would be for the state to set forth the constituent elements of the intended felony, the indictment sufficiently alleged entry with intent to commit a particular felony. Vaughn v. State, 530 S.W.2d 558 (Tex. Crim. App. 1975), 12 CLB 348.

§ 34.22. —Motions raising legal defenses

Illinois The trial court erred in denying defendant's pretrial challenges to the indictment and in denying his motion in arrest of judgment because the statute of limitations barred the offenses charged. Nowhere in the indictment was it alleged or stated that the statute of limitations was tolled in the interval between the commission of the offenses and the return of the indictment. And since each count on its face set forth the alleged offense as being committed on a date beyond the statute of limitations, each was legally insufficient and subject to dismissal.

If the statute of limitations had been tolled, as the state contended, this was a material allegation which should have been pleaded and proved, said the court, and the state did neither. People v. Hawkins, 340 N.E.2d 223 (Ill. App. 1975), 12 CLB 473.

§ 34.23. —Dismissing indictment

Court of Appeals, 4th Cir. Defendants who were convicted of conspiracy to violate the gun-control law, contended that the indictment was improperly open-ended with respect to the times that the conspiracy began and ended. The indictment described the conspiracy as "beginning on or before January 3, 1972 and continuing until on or *after* December 22, 1972."

Held, in affirming the conviction, that the district court had quite properly construed the indictment to mean "on or about" the mentioned dates, and had, with the agreement of the government, confined the government's proof to events that occurred within those dates. United States v. Grubb, 527 F.2d 1107 ([N.C.] 1975), 12 CLB 609.

Louisiana *See* State v. Cain, 324 So. 2d 830 (La. 1975), 12 CLB 472, CLD § 54.10.

New York *See* People v. Mackey, 371 N.Y.S.2d 559 (Suffolk County Ct. 1975), 12 CLB 99, CLD § 33.60.

§ 34.25. Sufficiency and legality of evidence before grand jury

Arizona Defendants brought a motion to dismiss an indictment on the ground of *factual* insufficiency The trial judge dismissed the indictment after criticizing the district attorney for not having instructed the grand jury on the elements of the crime sought to be charged and for not having called any witnesses, relying solely on hearsay evidence.

At issue was whether Rule 16.7 of the 1973 Rules of Criminal Procedure, under which the indictment was dismissed, allowed the trial court to test the factual sufficiency of an indictment.

Reinstating the indictment, the Arizona Supreme Court held that there was no intention in the adoption of Rule 16.7 "to change the long established rule that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . . A trial court has no power to inquire into or weigh the legal sufficiency of the evidence presented to the grand jury from which an indictment resulted." State *ex rel.* Preimsberg v. Rosenblatt, 543 P.2d 773 (1975), 12 CLB 348.

§ 34.26. —Failure to move, effect of

New York *See* People v. Davis, 370 N.Y.S.2d 328 (N.Y. App. 1975), 12 CLB 88, CLD § 80.45.

§ 35.15. Discovery—statements of witnesses

United States Supreme Court Defendant was indicted with several others for using the mails to defraud by means of a fraudulent scheme. The chief government witness was a co-conspirator who agreed to turn state's evidence in exchange for lenient treatment.

Prior to trial, government attorneys conducted a series of interviews with the witness dealing with his forthcoming testimony. In all but one of these instances, the interviews were not taken before a reporter and the notes of the meetings were simply handwritten by the lawyers. At trial, the witness testified on cross-examination that during the course of these interviews the lawyers had periodically read their notes back to him to determine whether they were correctly reflecting what he was relating to them.

Defendant thereafter moved for production of the handwritten notes pursuant to the Jencks Act, 18 U.S.C. § 3500. The Court held that a writing prepared by a government lawyer relating to the subject matter of the testimony of a government witness that has been "signed or otherwise adopted or approved" by the witness is producible under the Jencks Act, and is not rendered nonproducible because the government lawyer interviewed the witness and wrote the "statement." Nothing in the Act, said the Court, "even remotely suggests that 'an agent of the Government' excludes Goverment lawyers."

The Court went on to note that while there was "some risk" that a witness' words would be distorted in notes taken by a government lawyer, "there is no such danger where a witness has adopted or approved the lawyer's notes."

The Court, noting in conclusion that some of the material was subsequently discovered to be handwritten statements of the witness himself, rather than notes of the government lawyers, said that this, as well as other issues, was to be resolved by the district court. "For example, it will be necessary to determine whether the prosecutors' notes were actually read back to [the witness] and whether he adopted or approved them. In addition, the court may have to consider whether the notes [of the witness] were in existence at the time of [defendant's] motion." Goldberg v. United States, 96 S. Ct. 1338 (1976), 12 CLB 603.

Court of Appeals, 9th Cir. Alleging that evidence against them had been obtained as a result of two illegal wiretaps con-

ducted by the FBI, defendants moved to suppress. At the hearing, the government called four FBI agents. The defendants, for impeachment purposes, requested copies of investigative reports, memoranda, and statements of the FBI relevant to their testimony. The government opposed the motion to produce, claiming that the Jencks Act (18 U.S.C. § 3500) permitted it to withhold such documents until its witnesses testified *at the trial.* The magistrate recommended, and the district court ordered, production, relying on its discretion to determine the scope of examination.

The Ninth Circuit reversed, holding that the Jencks Act did, indeed, prohibit court-ordered production of statements of government witnesses at a pretrial suppression hearing.

> "While we may encourage the government to disclose Jencks Act statements prior to the time when it is statutorily required to do so, . . . we cannot compel such a course."

United States v. Spagnuolo, 515 F.2d 818 (1975), 12 CLB 76.

§ 35.56. —Prior performance of jury panel

District of Columbia Defense counsel, during voir dire of the jury panel, asked whether the government possessed any information regarding the performance of members of the panel in prior criminal jury trials. When the government responded that it did possess internal working notes of several assistant U.S. attorneys who had tried cases before juries drawn from the present panel, defense counsel immediately, and unsuccessfully, moved for the production of this information.

Defendant contended that under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), the trial court had erred in refusing to require the disclosure, since the information contained in the notes would have been favorable and beneficial to the defense.

The court disagreed. Since the jury panel information "was neither evidence nor was it material to the guilt or punishment of [defendant], its production was clearly not mandated under *Brady,*" concluded the court. Britton v. United States, 350 A.2d 734 (1976), 12 CLB 475.

§ 35.70. Pretrial examination of evidence

Louisiana Defendant, charged with second-degree murder, moved prior to trial to examine all the gun pellets recovered by the police in their investigation of the shooting of the victim. The motion was denied, notwithstanding defendant's contention that such an inspection was crucial inasmuch as the murder weapon had never been found.

On appeal, he cited Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975), wherein the Fifth Circuit overturned a Louisiana conviction on the ground that the denial of that defendant's request for a pretrial examination of the murder bullet was a denial of due process.

The court held the *Barnard* case distinguishable. In *Barnard,* the bullet was 75 percent destroyed and identification was made on the remaining 25 percent, whereas the bullets in the present case "were not badly damaged, permitting a quick comparison under a dual microscope at the trial." Moreover, the guilt of defendant was established by eyewitness testimony. State v. White, 321 So. 2d 491 (1975), 12 CLB 205.

§ 36.00. Severance

South Carolina *See* State v. Alford, 222 S.E.2d 222 (1976), 12 CLB 620, CLD § 8.00.

GUILTY PLEAS
(also nolo contendere)

§ 37.00. Plea bargaining

Court of Appeals, 10th Cir. *See* United

States v. Smith, 525 F.2d 1017 (1975), 12 CLB 342, CLD § 47.30.

Alabama *See* English v. State, 325 So. 2d 211 (Ala. Crim. App. 1975), 12 CLB 468, CLD § 37.80.

"Policy and Procedure in the Investigation and Prosecution of Government Officials," 12 CLB 26 (1976).

§ 37.05. Equivocal guilty plea

Pennsylvania In the instant case, the Superior Court of Pennsylvania reaffirmed its position that, notwithstanding the more liberal federal constitutional rule, "the law in Pennsylvania requires that a trial court must reject a tendered plea of guilt if the defendant at the same time recites facts sufficient to constitute a defense to the criminal charge." Commonwealth v. Eskra, 345 A.2d 282 (Pa. Super. 1975), 12 CLB 208.

§ 37.10. Procedure to be followed by trial judge in determining whether plea should be accepted—general duty to advise defendant

New York Pursuant to an informer's tip, defendant was arrested for carrying a gun and ammunition while working at his job in the post office at Kennedy Airport.

The New York statute under which defendant was charged made possession of a gun and ammunition a class D felony unless the possession occurred in "such person's home or place of business," in which case the offense was categorized as a misdemeanor. The term "place of business" had not at the time been definitively interpreted.

Defendant was permitted to plead to the class E felony of attempted possession, which resulted in a six-month sentence. Appealing his conviction, defendant contended that the judge had an absolute duty, before accepting his plea to the class E felony, to warn him that the law under which he was charged was ambiguous and might support only a misdemeanor charge.

The court disagreed, and held that the judge in accepting the plea was not under a duty to inquire as to whether defendant knew that the law might be capable of an interpretation more favorable to him than his plea was. Such a "potential ambiguity" in the law was not sufficient to trigger an inquiry—i.e., "alert a judge to the fact that the defendant's plea is inappropriate." People v. Francis, 38 N.Y.2d 150, 379 N.Y.S.2d 21 (N.Y. App. 1975), 12 CLB 468.

Pennsylvania *See* Commonwealth v Thompson, 351 A.2d 280 (1976), 12 CLB 469, CLD § 37.42.

West Virginia Noting the ever-increasing number of collateral attacks upon valid guilty pleas, and that the state's circuit courts in general "do not engage in sufficient dialogue with the defendant to enable an appellate court, or a federal or state trial court proceeding in habeas corpus, to determine whether the defendant knowingly and intelligently pleaded guilty with a full understanding of the rights he waived as a result of his plea," the Supreme Court of Appeals of West Virginia set forth the following guidelines:

Indictment: A trial court should determine whether the defendant is the same person as the individual charged in the indictment, that the defendant has received a copy of the indictment returned against him, and that the defendant understands the nature and meaning of the criminal charges made against him in that indictment. In this regard the court should translate formal charges which include words of art into language which a layman defendant can understand. It is preferable that questions calling for "yes" or "no" answers be avoided.

The court should interrogate the ac-

cused with regard to the circumstances under which he received a copy of the indictment and the opportunity which he has had to read and understand it. The defendant should be required to recite back to the court exactly what the crime is to which he is pleading guilty and what the penalty can be.

Counsel: The court should inform the defendant on the record that he is entitled to counsel and that the word "counsel" means a lawyer or attorney—a person schooled in law and legally entitled to appear in court in his defense. The accused should be informed that he may select and employ counsel of his own choice or, if the defendant is indigent, that counsel qualified in the handling of criminal matters will be appointed by the court to prepare his case. The court should ask the accused whether he has an attorney, and, if so, the attorney should be interrogated with regard to the extent he has advised his client. The accused should then be required to recite for the record what conferences he has had with his attorney and whether his attorney has previously advised him concerning the constitutional rights which he is waiving by entering his guilty plea.

It is important at this stage that the court determine whether the accused is satisfied with appointed counsel if he has such counsel. If the defendant waives counsel, he should be informed that a waiver of counsel may be accepted only if intelligently and understandingly made and the court should determine this question not only to its own satisfaction, but also on the record for the satisfaction of a reviewing court.

Jury; sentencing: The defendant must understand that if he elects to plead guilty to the offense charged, he gives up his right to a jury trial by twelve qualified persons. If there is an agreement concerning probation, that should be set forth, and if there is no such agreement, the court should inform the defendant that the court is not aware of any agreement in that regard and that the court will make its own decision concerning sentence.

Plea bargain: When there is a plea bargain, the terms of the bargain should be set forth on the record, and the accused should be interrogated with regard to whether any pressure was exerted upon him to enter into a plea bargain. His attorney, if he has one, should be required to set forth for the record the reasons that he advised his client to plead guilty to the extent that such inquiry does not violate the attorney-client privilege.

Rights: Finally, before the court accepts the plea, the court should advise the accused that he need not plead guilty and that in addition to the rights outlined above he is entitled: (1) to require the state to prove his guilt beyond a reasonable doubt; (2) to stand mute during the proceedings; (3) to confront his accusers and cross-examine witnesses against him; (4) to call witnesses in his own defense and to testify himself in his own defense; (5) to appeal his conviction if there are any errors of law; (6) to move to suppress any illegally obtained evidence or illegally obtained confessions; and (7) to challenge in the trial court and on appeal any errors in pretrial proceedings.

Waiver: Finally, the defendant must fully understand that by entering a plea of guilty he waives all pretrial defects with regard to his arrest, the gathering of evidence, prior confessions, etc., and further, that if he enters a plea of guilty he waives all nonjurisdictional defects in the criminal proceeding.

Defendant's education: As an additional matter, it is suggested that the court inquire into the defendant's education and family circumstances, whether the defendant has a history of mental illness or is on drugs, and inquire whether the defen-

dant has discussed the advisability of his plea with his family and friends in order to spread upon the record anything that would be of value to an appellate court or trial court in a habeas corpus proceeding to determine whether the defendant's plea was voluntary. Call v. McKenzie, 220 S.E.2d 665 (1975), 12 CLB 350.

§ 37.20. —Duty to advise defendant of possible sentence

Court of Appeals, 7th Cir. A convicted defendant brought a proceeding (under 28 U.S.C. § 2255) to vacate his guilty plea on the ground that the district court had erred in accepting the plea without first advising him of the possibility that his sentence might be ruled to run consecutively to a sentence he was then serving in a state prison.

Held, in affirming the denial of his motion, that the possibility of such a ruling was not a "consequence" of defendant's plea of guilty within the meaning of Rule 11 of the Federal Rules of Criminal Procedure, requiring the court to first advise defendant of the consequences of his plea. Faulisi v. Daggett, 527 F.2d 305 ([Ind.] 1975), 12 CLB 613.

Nebraska Defendant pleaded guilty to six counts of debauching a minor. The trial court, in considering whether to accept the guilty pleas, did not specifically ask him about the specific facts of the offenses. Instead, the court asked him if he had given his attorney all the facts as he knew them, and the defendant replied that he had. The trial court, moreover, did not specifically advise defendant as to the potential penalties. Instead, the court asked him if he understood what possible penalties there might be, and whether or not he had discussed them with his attorney. Both questions were answered in the affirmative, and the court accepted the guilty pleas.

The court held that while it was advisable to do so, "the trial court is not required to specifically inquire of the defendant as to the factual basis for a plea of guilty."

Nor was there any error in the trial court's failure to advise defendant on the record of the potential penalties. "There is no question in this case but that the defendant was well aware of the range of the penalties." State v. Painter, 237 N.W.2d 142 (1975), 12 CLB 349.

§ 37.24. —Promises

Court of Appeals, 4th Cir. *See* Edwards v. Garrison, 529 F.2d 1374 (1975), 12 CLB 612, CLD § 37.90.

§ 37.42 Duty to inquire as to factual basis for plea

Court of Appeals, 6th Cir. A state prisoner sought federal habeas corpus relief on the ground, among others, that the trial court had violated the principles of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), by failing to inquire into the factual basis for the guilty plea before accepting it.

Held, in denying relief, that "there is no *constitutional* requirement that a trial judge inquire into the factual basis of a plea." Roddy v. Black, 516 F.2d 1380 (1975), 12 CLB 78.

Nebraska *See* State v. Painter, 237 N.W.2d 142 (1975), 12 CLB 349, CLD § 37.20.

Pennsylvania The first deficiency in the guilty plea colloquy, which was conducted by defendant's counsel with the court's approval, was the judge's failure to have elicited from defendant the facts he was admitting in pleading guilty to murder. When the judge accepted the plea of guilt, she was only certain that defendant admitted causing the death of the victim. Since it is essential that the killing be accompanied by malice, the judge's inquiry should have provided a basis for determining whether defendant was admitting a malicious killing.

The second deficiency in the colloquy was the judge's acceptance of defendant's guilty plea when his version of the killing included facts which suggested that he had a defense of self-defense, as revealed by the statement he gave to the police upon his arrest. "Before accepting the plea, the lower court must be satisfied that the accused is admitting guilt and is not asserting a claim (whether or not it would eventually prove successful) of defense, justification or excuse."

The third deficiency in the colloquy was that once the judge learned of the existence of the statement to the police and its contents, "it then became incumbent . . . not only to advise [defendant] that the defense, if established, would entitle him to an acquittal, but also that his act of entering a plea precluded any further opportunity of asserting his defense." Commonwealth v. Thompson, 351 A.2d 280 (1976), 12 CLB 469.

§ 37.80. Motion to withdraw or set aside guilty plea—grounds

Alabama As a result of plea bargaining, the prosecutor agreed, in exchange for a guilty plea, to recommend that defendant be sentenced to one year and a day. The trial court, however, imposed a sentence of seven years, and denied defendant's motion to withdraw his guilty plea. The appellate court reversed and remanded, saying:

> "[I]f the trial court decides not to carry out the agreement reached between the prosecutor and counsel for the accused, the accused must be afforded the opportunity to withdraw his guilty plea on motion promptly made, as was done in this case."

English v. State, 325 So. 2d 211 (Ala. Crim. App. 1975), 12 CLB 468.

Pennsylvania The fact that a murder defendant had an I.Q. of only 69 and the mental age of an eight- or nine-year-old did not automatically require holding that his guilty plea was a nullity. "[T]he test to be applied in determining the legal sufficiency of a defendant's mental capacity to stand trial, or enter a plea at the time involved, is not the *M'Naghten* 'right or wrong' test, but rather *his ability to comprehend his position as one accused of murder and to cooperate with his counsel in making a rational defense.*" Commonwealth v. Melton, 351 A.2d 221 (1976), 12 CLB 470.

§ 37.90. —Right to hearing

Court of Appeals, 4th Cir. The district court, prior to accepting defendant's plea of guilty pursuant to a plea bargain, advised defendant that it would not be bound by the government's sentence recommendation and elicited from him a statement to the effect that no promises had been made, aside from the plea bargain, to induce the plea. The court then sentenced him to a substantially greater prison term than that recommended by the prosecution.

Defendant subsequently petitioned for a writ of habeas corpus, alleging that he had, in fact, been assured by counsel for both sides that the government's recommendation would be binding on the court, and that his lawyer had advised him to suppress his truthful answer that he did not wish to plead guilty if the district court failed to treat the government's recommended sentence as binding on it. For these reasons, he asserted, his plea could not be said to have been voluntarily and intelligently made.

Held, in vacating the judgment and remanding for an evidentiary hearing, that

> "If, in fact, other promises were made to [defendant] and he answered that he wished to plead guilty even if the district court imposed a sentence more severe than that recommended by the government and that answer was not the product of [defendant's] informed

free will, but was given solely because [defendant] had been induced to give it, [defendant's] plea should not stand."

Edwards v. Garrison, 529 F.2d 1374 ([N.C.] 1975), 12 CLB 612.

§ 40.15 Guilty plea as waiver of all prior nonjurisdictional defects

United States Supreme Court *See* Menna v. New York, 96 S. Ct. 241 (1975), 12 CLB 191, CLD § 54.20.

OTHER PRETRIAL PROCEEDINGS

§ 41.00. Proceeding to determine defendant's competency to stand trial

Michigan The trial court, after a hearing, ruled that defendant was incompetent to stand trial, and ordered him committed to the state's Department of Mental Health. Seven months later, that department certified that defendant was competent to stand trial, tendering a psychiatric report to this effect. A state statute provided that at such point, "the court shall immediately hear and determine the question of competence to stand trial."

However, no hearing was held. Instead, defendant, who was represented by appointed counsel, signed a "waiver of competency hearing" form, reading, in pertinent part, "I do hereby in open court voluntarily waive and relinquish my right to a competency hearing *at which testimony is taken.*" (The court's emphasis.) The court considered the report and determined that defendant was competent to stand trial.

Appealing his conviction, defendant, through his second counsel, contended that the trial court committed reversible error because it failed to hold the statutorily required competency hearing. The court held that in the instant case, the waiver defendant signed was "not a waiver of defendant's right to a competency hearing but a waiver of his right to have the examining psychiatrist appear in court to testify and his right to call his own witnesses to give rebuttal testimony. . . . Accordingly defendant waived his right to have the doctor appear and his right to call witnesses to give rebuttal testimony. The court thereupon considered the report, which was apparently the only evidence submitted, and determined the defendant to be competent to stand trial." People v. Walker, 237 N.W.2d 252 (Mich. App. 1976), 12 CLB 670.

Pennsylvania *See* Commonwealth v. Melton, 351 A.2d 221 (1976), 12 CLB 470, CLD § 37.80.

C. THE TRIAL

§ 43.02. Disqualification of trial judge

Pennsylvania Defendant in the instant case challenged at a pretrial hearing the constitutionality of his police-obtained confession. The suppression court denied the motion.

The issue of the voluntariness of the confession was again raised at trial. The trial judge (a different judge from the one who conducted the suppression hearing) found the confession to be involuntary. He proceeded, however, to hold the defendant guilty of second-degree murder, but stated on the record that he had not considered the confession in making his determination of guilty.

Defendant contended on appeal that when the question of the voluntariness of a confession has been placed in issue at trial, the judge who passes upon that issue, if he resolves it in favor of the defendant, cannot also determine guilt. In support of this position, he argued that the knowledge of the contents of the confession could *unconsciously* color the judge's thinking in the guilt-determining process.

The Supreme Court of Pennsylvania affirmed the conviction, rejecting the implication in defendant's argument that

"the mere exposure to prejudicial evidence is enough to nullify a judge's verdict in a case." Commonwealth v. Green, 347 A.2d 685 (1975), 12 CLB 344.

§ 43.20. Absence of defendant or his counsel

Georgia Where defendant was not permitted to accompany the jury when it left the courtroom to view the automobile involved in the crime charged, he was "deprived of his right to be present at every stage and proceeding of his trial," and hence was entitled to a new trial. Durret v. State, 219 S.E.2d 9 (Ga. App. 1975), 12 CLB 206.

§ 43.42. Right to have stenographer

Alabama Although Alabama's statute does not require the official court reporter to take down stenographic notes of the complete closing arguments of counsel, it was reversible error for the trial court to deny defense counsel's motion at the close of the evidence (1) that the court reporter be instructed to take shorthand notes of the arguments, or (2) that defendant be allowed to bring in another stenographer for this purpose. Shuler v. State, 324 So. 2d 313 (Ala. Crim. App. 1975), 12 CLB 354.

§ 43.65. Right to make closing argument

United States Supreme Court *See* Herring v. New York, 95 S. Ct. 2550 (1975), 12 CLB 74, CLD § 7.50.

§ 44.00. Conduct of trial judge—in general

United States Supreme Court *See* Geders v. United States, 96 S. Ct. 1330 (1976), 12 CLB 600, CLD § 7.20.

Florida After the state's key witness (and victim of the crime) finished testifying, she went up to the bench and shook hands with the judge and they engaged in conversation.

The court reversed the conviction, saying:

> "From the judge's shaking hands and conversing with the state's witness, the jury could most reasonably infer that he believed her to be a very credible, honest witness. This inadvertent conduct was prejudicial to the defendant, especially in view of the fact that this was the state's key witness."

Abrams v. State, 326 So. 2d 211 (Fla. App. 1976), 12 CLB 480.

New York Police officers, acting upon a search warrant, approached defendant's apartment, where his wife and a friend were present. An officer allegedly saw one of the windows open and a paper bag being thrown out. It contained drugs and a revolver. The officer quickly ran into the building, where he found his fellow officers still in the hallway; when defendant opened his apartment door, he was arrested. At trial, defendant claimed he had been framed and that the contraband was not his and denied throwing it out of the window. As he was about to leave the stand, the trial judge, in the presence of the jury, asked him whether his wife had been present and whether she was going to testify. He replied that she was present but would not be called as a witness.

During the court's charge to the jury, defense counsel, in the jury's presence, requested a supplemental charge that "the defendant [need] not take the stand, nor need he bring witnesses in his behalf." The judge replied:

> "The jury may consider the absence of any witness if the witness did have evidence that may have shed light upon material aspects of this case and provided that the witness was in control of the litigant failing to call that witness."

"Ordinarily," said the court in affirming the conviction, "a court may not comment upon a defendant's failure to testify or otherwise to come forward with ev-

idence, but, once a defendant does so, his failure to call an available witness who is under defendant's control and has information material to the case may be brought to the jurors' attention for their consideration."

The mere fact that an unwilling witness is the spouse of the accused does not alter the situation. Absent a privileged communication, said the court, a jury may consider the failure of a defendant to call his spouse. In the present case, the presence of a family friend, a third party, "at the events to which the wife here was in a position to testify, rendered the privilege inapplicable."

> "So far as the questions and comments by the Trial Judge are concerned, though they drew unnecessary attention to the fact that the wife was a witness and would not testify and, therefore, it would have been preferable if they had not taken place, we cannot say, especially in view of the restrained way in which the charge itself was phrased, that the defendant was prejudiced."

People v. Rodriguez, 38 N.Y.2d 95, 375 N.Y.S.2d 665 (N.Y. App. 1975), 12 CLB 477.

§ 44.09. —Refusal to grant delay

Georgia Judge Evans of Georgia's Court of Appeals, in response to a trial judge's demand that any further reversals of his decisions be written in poetry, rendered, in the interest of justice, the following opinion (which does not include the footnotes with supporting citations):

The D.A. was ready
His case was red-hot.
Defendant was present,
His witness was not.[1]

He prayed one day's delay
From His honor the judge.
But his plea was not granted
The Court would not budge.[2]

So the jury was empaneled
All twelve good and true
But without his main witness
What could the twelve do?[3]

The jury went out
To consider his case
And then they returned
The defendant to face.

"What verdict, Mr. Foreman?
The learned judge inquired.
"Guilty, your honor."
On Brown's face — no smile.

"Stand up" said the judge,
Then quickly announced
"Seven years at hard labor"
Thus his sentence pronounced.

"This trial was not fair,"
The defendant then sobbed.
"With my main witness absent
I've simply been robbed."

"I want a new trial —
State has not fairly won."
"New trial denied,"
Said Judge Dunbar Harrison.

"If you still say I'm wrong,"
The able judge did then say
"Why not appeal to Atlanta?
Let those Appeals Juges earn part of their pay."

"I will appeal, sir" —
Which he proceeded to do —
"They can't treat me worse
Than I've been treated by you."

So the case has reached us —
And now we must decide
Was the guilty verdict legal —
Or should we set it aside?

Justice and fairness
Must prevail at all times;

This is ably discussed
In a case without rhyme.[4]

The law of this State
Does guard every right
Of those charged with crime
Fairness always in sight.

To continue civil cases
The judge holds all aces.
But it's a different ball-game
In criminal cases.[5]

Was one day's delay
Too much to expect?
Could the State refuse it
With all due respect?

Did Justice applaud
Or shed bitter tears
When this news from Savannah
First fell on her ears?

We've considered this case
Through the night – through the day.
As Judge Harrison said,
"We must earn our poor pay."

This case was once tried –
But should now be rehearsed
And tried one more time.
This case is reversed!

Judgement reversed.

Brown v. State, 216 S.E.2d 358 (1975), 12 CLB 92.

Louisiana In the presence of an undercover police officer, defendant accepted money from, and gave heroin to, an informer who, in turn, handed it over to the officer. Only four days before the trial, the district attorney amended the bill of information and bill of particulars to read that it was the informant, and not the police officer, to whom the illegal sale had been made. The district attorney did not notify defendant of the name of the informant, nor was he produced at trial.

On the morning of the trial, defendant moved for a continuance, pleading surprise and saying that additional time was needed to find out the name and whereabouts of the informant in order to properly prepare his defense. The motion was denied.

Reversing the conviction, the court held that the trial judge had committed reversible error in denying defendant's motion for a continuance. The identity and possible testimony of the informer were highly relevant and material and might have been helpful to the defense. State v. Gibson, 322 So. 2d 143 (1975), 12 CLB 206.

§ 44.09.5. —Refusal to declare a mistrial

Missouri Although defendant was charged only with possession of LSD, the prosecutor said to the jury in his opening statement that defendant had admitted to the arresting officer that he was engaged in selling the drug for "$2.00 a pop or a sale." Defense counsel timely objected on the ground that the prosecutor improperly told the jury that defendant was guilty of selling narcotics, a crime totally unrelated to the one for which he was standing trial.

Held, the trial court's refusal to declare a mistrial was not an abuse of discretion. State v. Tygart, 531 S.W.2d 47 (Mo. App. 1975), 12 CLB 354.

§ 44.12. —Conduct where defendant is pro se

Maryland *See* Hamilton v. State, 351 A.2d 153 (Md. Spec. App. 1976), 12 CLB 463, CLD § 7.72.

§ 44.18. —Prejudicial comments

Georgia A trial judge, in sustaining the prosecutor's objections to a certain line of defense questioning, reminded defense counsel, in the presence of the jury, that "*you have 30 days in fact to except to any ruling of this Court after the case is over.*" Defense counsel promptly moved for a

mistrial on the ground that the judge's comment suggested to the jury that the court's inclination was for conviction.

Held, in reversing the conviction, that the jurors in this case could not be presumed to have escaped the conclusion "that the trial court was telling them that after the trial had ended, *defendant and his counsel would be cast in the role of 'excepting'* to what had taken place at trial – in other words, that they would lose the case and defendant would be convicted." Floyd v. State, 217 S.E.2d 425 (Ga. App. 1975), 12 CLB 91.

§ 44.60. —Disclosure that codefendant has pleaded guilty

Georgia It was error of constitutional magnitude to take the guilty plea of codefendant in the presence of the jury panel from which the jury to try defendant was to be selected. This was tantamount to permitting the jury to consider as evidence the guilty plea of a jointly indicted codefendant, said the court, noting that jurors are entitled to take note of anything that happens in their presence and hearing from the inception of the case. Hayes v. State, 222 S.E.2d 193 (Ga. App. 1975), 12 CLB 622.

§ 44.71. —Allowing jury to take notes

Maryland The trial judge told the jury, over defense objection, that only the foreman could take notes, adding:

> "We ask the rest of you not to take notes, for the very simple reason that it is difficult at best to be writing down, unless you are well trained in that field, to be taking notes and also listen to everything that is going on at the same time."

Held, that while the trial court retained the discretion to decide whether or not the jury could take notes, it was an unreasonable exercise of that discretion to allow only one juror to do so. Dillon v. State, 342 A.2d 677 (Md. App. 1975), 12 CLB 91.

§ 44.80. —Motions for judgment of acquittal

Ohio Where a defendant elects to proceed with his evidence after denial of his motion for a directed verdict or acquittal at the end of the state's case, he is deemed to have waived his legal objections and, therefore, may not validly complain should his own evidence supply the omissions in the state's proof. State v. Larry, 44 Ohio App. 2d 92, 335 N.E.2d 731 (1975), 12 CLB 209.

§ 45.00. Conduct of prosecutor—in general

Court of Appeals, 2d Cir. The key state witness in a murder trial (who was under indictment for three felonies) repeatedly denied that he had been offered favorable treatment in exchange for his testimony. The prosecutor, who had indeed promised the witness special consideration, made no effort to correct the perjurious testimony.

More than three years after defendant's conviction, it was discovered that a specific offer had, in fact, been extended.

Having exhausted available state remedies, defendant petitioned for a writ of habeas corpus. The question facing the Second Circuit Court of Appeals was whether defendant "should not be permitted to raise . . . due process claims because he and his counsel had reason to suspect the falsity of the witness's answers, but failed to make their suspicions known," as well as whether or not the prosecutorial misbehavior was harmless error.

The court granted the writ of habeas corpus. It found that the prosecutor's misbehavior could have affected the ultimate outcome of the trial. Since there was a "very real possibility" that defendant may have been innocent or, at least, that the jury might not have been convinced of his guilt beyond a reasonable doubt if the promise to the key witness had been

known, it would be "inappropriate," said the court, not to permit defendant "to challenge the egregious and highly damaging prosecutorial misconduct" solely because he and his lawyer may have failed to utilize all available means for exploring the prosecutor's highhandedness at the trial. United States *ex rel.* Washington v. Vincent, 525 F.2d 262 (1975), 12 CLB 342.

§ 45.05. —Prosecutor's discretion to prosecute

"Policy and Procedures in the Investigation and Prosecution of Government Officials," 12 CLB 26 (1976).

"The Role of a Prosecutor in a Free Society" by Hugh L. Carey, 12 CLB 317 (1976).

"The Rural Prosecutor and the Exercise of Discretion" by Gary F. Thorne, 12 CLB 301 (1976).

"Toward a Fairer System of Justice: The Impact of Technology on Prosecutorial Discretion" by Charles R. Work, Lawrence I. Richman, and David L. Williams, 12 CLB 289 (1976).

§ 45.07. —Improper questioning of witnesses

Georgia The prosecutor asked defendant on cross-examination if she was "surprised the police had a warrant." When she answered that she had been surprised, the prosecutor, over defense objection, used this response as justification for showing that there had been other warrants and searches of the same premises prior to that occasion despite the absence of convictions arising therefrom.

Held, in reversing the conviction, that the state's questioning was highly improper in that it had the "effect of placing the defendant's character in evidence without her having previously done so." Kincaid v. State, 222 S.E.2d 27 (Ga. App. 1975), 12 CLB 622.

Maryland *See* Dorsey v. State, 350 A.2d 665 (1976), 12 CLB 481, CLD § 73.30.

Pennsylvania *See* Commonwealth v. Greco, 350 A.2d 826 (1976), 12 CLB 476, CLD § 2.35.

New York *See* People v. Arocho, 379 N.Y.S.2d 366 (Sup. Ct. 1976), 12 CLB 475, CLD § 51.03.

§ 45.10. —Comments made during opening statement

Missouri *See* McConnell v. State, 530 S.W.2d 43 (Mo. App. 1975), 12 CLB 359, CLD § 7.56.

Missouri *See* State v. Tygart, 531 S.W.2d 47 (Mo. App. 1975), 12 CLB 354, CLD § 44.09.5.

§ 45.20. —Comments made during summation—in general

Court of Appeals, 7th Cir. As the result of an alleged sale to an undercover agent, defendant was tried for distribution and attempted distribution of a controlled substance. During his closing remarks to the jury, the prosecutor argued, over defense objection, that if the jury were to find defendant not guilty, it would, in effect, be saying that both the agent and prosecutor had conspired to trump up a false case, thereby violating the civil rights of the defendant and committing a crime on their own.

Held, in reversing the conviction, that the prosecutor had misstated the law:

> "When reaching a verdict in a criminal trial, the jury does not have to conclude that the government or its witnesses violated the civil rights of the accused or committed a crime against him to make a finding of not guilty."

The error was prejudicial, moreover, since the witness' credibility in the instant case was a critical issue and since the prosecutor's remarks amounted to a personal vouching for the credibility of

his witness. United States v. Phillips, 527 F.2d 1021 (1975), 12 CLB 610.

Michigan The defense attorney's closing statement to the jury (in a trial for assault with intent to kill) that the victims would henceforth be better police officers for having been shot, merited the sharp response from the black prosecuting attorney that, notwithstanding black minority problems with the Detroit Police Force, the remark was unjustified and uncalled for.

Said the court: "We do not view this remark as vouching for the credibility of the people's witnesses nor do we view these remarks as prejudicial to the defendant." People v. Dickerson, 233 N.W. 2d 612 (Mich. App. 1975), 12 CLB 214.

Pennsylvania A district attorney's statement in closing argument that "the jury was to consider only the evidence they heard from the witness stand," did not constitute an improper comment on defendant's failure to testify. Commonwealth v. Adams, 341 A.2d 206 (Pa. Super. 1975), 12 CLB 96.

Texas Defendant objected to the prosecutor's closing argument that defendant had participated in the robbery, "not because he was hungry or desperate for money, he did it because it was his pleasure," on the ground that the argument was not based on evidence. The court held that the argument was not "manifestly improper, harmful, or prejudicial," where there was evidence that defendant "had been engaged in several jobs and that he had a savings account." Holloway v. State, 525 S.W.2d 165 (Tex. Crim. App. 1975), 12 CLB 95.

§ 45.22. —Comment as to punishment

Oklahoma The prosecutor's closing comments to the jury "undoubtedly were calculated to refer to the pardon and parole policies in Oklahoma" and must thus be considered to have been prejudicial. Since, however, they were made during the second stage of the trial proceedings, after the guilty verdict had been rendered, the appropriate remedy would be modification of the sentence rather than reversal. Carbray v. State, 545 P.2d 813 (1976), 12 CLB 622.

§ 45.25. —Comment on defendant's failure to testify

Oklahoma A prosecutor's statement to the jury that the defense, as well as the state, had the power to "subpoena anybody they want to and put any testimony they want to on the witness stand," did not constitute a comment on the failure of defendant to take the stand:

> "The statement complained of does not tend to focus any more attention on the defendant's failure to take the stand than the statement that the evidence is 'uncontroverted' or 'uncontradicted.'"

Stevens v. State, 540 P.2d 1199 (Okla. Crim. App. 1975), 12 CLB 214.

§ 45.26. —Comment on defendant's silence in custody

Court of Appeals, 10th Cir. On cross-examination in a trial for murder and armed robbery, the state prosecutor elicited without objection from defendant his failure, when arrested, to tell the police of his alibi. Defendant explained his post-arrest silence as being on the advice of his counsel. The prosecutor, again without defense objection, commented sharply in his closing argument on defendant's silence. Defendant was convicted, and petitioned for a writ of habeas corpus, contending, inter alia, that the cross-examination and closing argument infringed upon his constitutional right of due process and his constitutional privilege against compelled self-incrimination.

The Sixth Circuit held that the admission of evidence of, and the comment on, defendant's pretrial silence was "error of constitutional magnitude." While Harris v. New York, 401 U.S. 222, 91 S. Ct. 643

(1971), permits "statements elicited in violation of *Miranda*, and, arguably, silence in compliance with *Miranda*, to be admitted to impeach defendant's credibility," this could occur "if, but only if, those statements or silence is sufficiently" trustworthy, sharply contrasting, or inconsistent with the testimony to be impeached. In the instant case, the court went on, defendant's silence was not sufficiently inconsistent with his trial testimony (to the effect that he had been home asleep at the time of the crime) to permit the use of that silence to impeach his testimony. Hence, its use violated his right to remain silent. Silence at the time of arrest is not an inconsistent or contradictory statement, emphasized the court, but simply the exercise of a constitutional right.

While the court recognized that constitutional error in using pretrial silence to impeach trial testimony may, on occasion, be harmless error, in the instant case the evidence of defendant's guilt was "far from being overwhelming," and the evidence of his pretrial silence "could easily have been prejudicial." Minor v. Black, 527 F.2d 1 ([Ky.] 1975), 12 CLB 456.

§ 45.35. —Improper expression of opinion

Court of Appeals, 7th Cir. *See* United States v. Phillips, 527 F.2d 1021 (1975), 12 CLB 610, CLD § 45.20.

Washington Defendants contended that reversible error was committed by the prosecutor, during his closing arguments, when he commented that it was his belief that the defendants had lied. The prosecutor contended that the comment was invited; that his statement was not an expression of his personal opinion of the defendants' guilt, but only his opinion that they were lying.

The court found the prosecutor's contentions not persuasive: "The impropriety of a prosecutor expressing his personal opinion in closing argument needs no citation." However, after careful examination of the record, the court concluded that "defendants were not denied a fair trial." State v. Hanson, 544 P.2d 119 (Wash. App. 1975), 12 CLB 480.

§ 45.36. —Reference to matter not in evidence

Texas The prosecutor's argument to the jury, in a prosecution for conspiracy to exhibit obscene material, that

> "We might as well quit prosecuting obscenity cases if this film here isn't obscene, and concentrate on sex crimes and other matters that arise after people view things like that,"

was prejudicial error requiring reversal of the conviction. The only reasonable interpretation of the argument, said the court, was that there was "a causal connection between dirty movies and sex crimes," which was unsupported by any evidence in the record, and which was clearly prejudicial to defendants. Moore v. State, 530 S.W.2d 536 (Tex. Crim. App. 1975), 12 CLB 355.

§ 45.39. —Insanity plea as "opening the door"

Court of Appeals, 9th Cir. Defendant filed a notice of intention to plead not guilty by reason of temporary insanity. The trial judge thereupon ordered him to submit to a psychiatric examination conducted by court-appointed psychiatrists. On advice of counsel, defendant refused to talk to them on Fifth Amendment grounds. He did, however, retain his own psychiatric witnesses and cooperated in their examination of him. At trial, the judge, over the state's objection, allowed testimony from defendant's experts supporting his insanity defense. However, despite defendant's motion for an order barring the state from introducing testimony indicating defendant's refusal to talk to court-appointed psychiatrists, such testimony was permitted.

Defendant appealed, contending that

such testimony constituted an impermissible sanction on the exercise of the privilege against self-incrimination. The Court of Appeals held:

> "Once the defendant indicates his intention to present expert testimony on the insanity issue, the privilege against self-incrimination does not thereafter protect him from being compelled to talk to the State's expert witnesses, as it necessarily follows that if the refusal may be punished, the refusal is not an exercise of privilege. It therefore also necessarily follows here that the witness's answer indicating that nonprivileged refusal did not constitute a burden on the exercise of the constitutional privilege."

Karstetter v. Cardwell, 526 F.2d 144 ([Ariz.] 1976), 12 CLB 456.

Indiana *See* Whitten v. State, 333 N.E.2d 86 (1975), 12 CLB 94, CLD § 53.09.

EVIDENCE

§ 46.80. Necessity of laying foundation

Louisiana Overruling defendant's objection that the application for the search warrant contained hearsay evidence, the trial judge ruled that the application, the search warrant, and the return were admissible "in its entirety."

Held, "While an application for a search warrant containing the affidavit upon which the search warrant is used is closely related to the search warrant, we are unable to say that it is a part of the search warrant itself." As to hearsay evidence, its admission was not reversible error on this ground because the hearsay evidence was merely cumulative and nonprejudicial. But what the court held *was* reversible error was the admission in evidence of that portion of the application that contained the confessions and/or inculpatory statements of defendants "without requiring the state to lay a proper foundation as to the free and voluntary nature of these statements." State v. Lucien, 323 So. 2d 784 (1975), 12 CLB 351.

Michigan *See* People v. Gunne, 237 N.W.2d 256 (Mich. App. 1976), 12 CLB 471, CLD § 52.40.

Oregon *See* State v. Dowell, 541 P.2d 829 (Ore. App. 1975), 12 CLB 210, CLD § 52.60.

§ 46.90. Relevancy

Minnesota Defendant was tried for having committed sodomy upon a child in his home. The state was permitted, over defense objection, to introduce testimony that defendant had possessed photographs and a poster relating to homosexual behavior.

Held, in affirming the conviction, that the display in defendant's apartment of pictures depicting aberrant behavior like that of which defendant was accused was admissible because it "refutes the inference otherwise to be drawn that defendant did not commit acts which others would consider unnatural and repulsive." State v. Shotley, 233 N.W.2d 755 (1975), 12 CLB 213.

§ 46.97. Variance between pleading and proof

Georgia Although defendant was indicted for unlawful distribution of the controlled drug *phencyclidine*, the state's expert witness testified at trial that the substance in question was, in fact, another controlled substance, *phencyclidine hydrocloride*. While both drugs were sometimes described by the abbreviation THC, the latter drug incorrectly so, they were entirely different substances. *Phencyclidine* is a base. *Phencyclidine hydrocloride*, properly abbreviated PCP (or peace pills), is a salt containing a cloride ion.

In reversing the conviction because of a fatal variance between the indictment and the proof, the appellate court observed: "Here the words have two differ-

ent meanings, and it cannot be characterized as a mere slight discrepancy." Williamson v. State, 216 S.E.2d 684 (Ga. App. 1975), 12 CLB 89.

North Carolina The indictment charged defendant with taking "$183.00 in money . . . from the presence, person, place of business, and residence of Harbor Farmes Incorporated DBA Convenient Food Mart Masonboro Loop Rd. New Hanover County-Gladys Hanson and Dickie Kirkum Custodians."

The state offered no evidence that the property taken belonged to Harbor Farmes Inc.

Held, defendant's contention that because of this he should have been granted a nonsuit for variance was without merit.

> "An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property."

State v. Bozeman, 221 S.E.2d 91 (N.C. App. 1976), 12 CLB 474.

§ 47.00. Best evidence rule

Louisiana The defendant in a drunk driving case objected to the introduction into evidence of the positive results of a photoelectric intoximeter test unless the prosecution physically produced the machine operator's permit or certificate qualifying him to administer such test.

Held, in reversing the conviction, that:

> "Mere testimony that the operator-witness possesses such a certificate is not enough in the face of the relator's insistence that the certificate be produced; inspection by the relator of the permit or certificate would show on its face whether the operator was certified to render the PEI test *at the time* that the relator submitted to the procedure."

State v. Jones, 316 So. 2d 100 (1975), 12 CLB 96.

§ 47.10. Character and reputation evidence

Court of Appeals, 4th Cir. A witness (a sheriff) called by the prosecution to rebut defendant's evidence of his good reputation, was asked the question:

> "Do you know what his [defendant's] character and reputation is for dealing in drugs?"

The sheriff answered:

> "About a year ago I had information he was dealing in drugs."

The Fourth Circuit held that the question was improper in several respects. The opening phrase, "Do you know," said the court, tended to call upon a witness's own knowledge of defendant rather than to ascertain the general talk of people about defendant. An appropriate opening phrase for such a question is "Have you heard." Additionally, the question, as worded, incorrectly addressed itself to the "character" as well as the "reputation" of the defendant. The "permissible inquiry is limited to the reputation of the accused, what those in the community perceive him to be, and not his character, what he actually is."

Moreover, the question was overly narrow in raising the matter of drugs. "The prosecution through its own rebuttal witnesses is limited to showing his bad general reputation," and may not elicit testimony concerning "specific traits" of the defendant. United States v. Curry, 512 F.2d 1299 (1975), 12 CLB 78.

Georgia Defendants *X* and *Y* were jointly tried for murder. *X* took the stand and asserted that *Y* was solely to blame for the shooting. Subsequently, on cross-examination, the district attorney asked *Y* a number of questions, which necessarily elicited answers concerning *Y*'s general character. At this juncture, *X* (whom *Y* had blamed for the crime) sought per-

mission to introduce in evidence Y's prior conviction for manslaughter.

Held, that the evidence of his prior conviction was inadmissible because it had been the state – and not the defendant Y – who had placed Y's general character in issue. "It is the option of the defendant alone whether or not to place his general character in issue." Askew v. State, 217 S.E.2d 385 (Ga. App. 1975), 12 CLB 94.

Kansas A pharmacy was held up at gunpoint by an individual who demanded and obtained a quantity of narcotic drugs. Defendant was charged. At the trial, the prosecution introduced, over defense objection, evidence that defendant was a narcotics addict. On appeal, defendant contended that his addiction was a "trait of character" within the meaning of a Kansas statute permitting the introduction of such evidence only when the defendant, himself, raised the issue of character.

Held, in sustaining the conviction, that drug addiction is not the type of "character trait" dealt with in the statute. "It cannot be shown to be 'good' or 'bad,' but is simply a medical fact." The evidence of defendant's addiction, said the court, had probative value because it tended to show a compelling motive for the crime, and thus was properly admitted. State v. Ralph, 537 P.2d 200 (1975), 12 CLB 95.

Oregon *See* State v. Dowell, 541 P.2d 829 (Ore. App. 1975), 12 CLB 210, CLD § 52.60.

Texas At the punishment phase of a murder trial, the judge, over defense objection, permitted the police chief to testify that defendant's reputation in his community for being a peaceful and law-abiding citizen was bad. The officer had never discussed defendant's reputation with anyone but had based his opinion solely on the facts of the case for which defendant had been tried and upon his "rap sheet."

Held, it was error to admit testimony of a witness as to defendant's bad reputation where the witness had never *discussed* the bad reputation of the accused with anyone. Reputation evidence, said the court, is "of necessity, based on hearsay," and without the requirement of discussion with other members of an accused's community, such testimony "would be nothing more than an inadmissible opinion." Mitchell v. State, 524 S.W.2d 510 (Tex. Crim. App. 1975), 12 CLB 95.

§ 47.20. Circumstantial evidence

Georgia Three men were involved in an armed robbery. Two were positively identified. The defendant in the instant case was discovered in the presence of the identified parties a short time after the crime was committed; no other man was present.

Appealing his conviction, defendant apparently raised the argument that his conviction had impermissibly rested on guilt by association.

Held, in sustaining the conviction, that evidence that "defendant was seen with the other robbers before the crime was committed and found with them immediately after at the home of one of them" was "sufficient to support a determination that he was a party to the crime." A defendant's discovery in the presence of an identified criminal closely after the commission of the crime may constitute circumstantial evidence of guilt. Hall v. State, 216 S.E.2d 687 (Ga. App. 1975), 12 CLB 214.

§ 47.22. —Flight

Court of Appeals, 2d Cir. *See* United States v. Lobo, 516 F.2d 883 (1975), 12 CLB 78, CLD § 8.00.

§ 47.30. Hearsay evidence

Texas At defendant's trial for the murder

of his wife and attempted murder of her boyfriend, the prosecutor was allowed, over objection, to read into the record (for the purpose of impeaching defendant on cross-examination), a divorce petition filed by the deceased against the defendant four years earlier.

Held, the divorce petition was objectionable as hearsay, and the reading from the petition "was no less hearsay than if it had been introduced into evidence itself." Erwin v. State, 531 S.W.2d 337 (Tex. Crim. App. 1975), 12 CLB 353.

§ 47.39. —Prior inconsistent statements as substantive evidence

West Virginia The state sought to connect defendants to the crime through a certain witness whom it called to the stand. The witness professed a loss of memory as to all details which might serve to implicate the defendants. The prosecution now declared him to be a hostile witness. The trail court permitted the prosecution to "impeach" him by resort to extensive questions based upon an out-of-court statement given by the witness to the police detailing the witness's role as go-between for the defendants in an attempt to sell the stolen object to a local businessman.

The court held that the trial court had erred in permitting the prosecution, "under the guise of impeachment," to use the witness' prior out-of-court statement "as *substantive* evidence to prove the truth of the matter asserted in the out-of-court statement," rather than as a means of weakening or destroying his testimony. State v. Spadafore, 220 S.E.2d 655 (1975), 12 CLB 352.

§ 47.40. —Admissions and confessions (See also § 1.00. et seq.)

Court of Appeals, 10th Cir. Discussions taking place during the course of plea bargaining are generally recognized to be privileged and inadmissible. "If the proceedings during plea bargaining could be introduced as inculpatory statements against the accused, there would not be very much plea bargaining. So, as a matter of policy it is essential that it be considered as privileged." United States v. Smith, 525 F.2d 1017 (1975), 12 CLB 342.

Alabama *See* Canada v. State, 325 So. 2d 513 (1960), 12 CLB 467, CLD § 1.00.

Pennsylvania *See* Commonwealth v. Sams, 350 A.2d 788 (1976), 12 CLB 466, CLD § 30.03.

§ 47.42 —Business records exception

Michigan Defendant, who raised the defense of insanity to the charge of armed robbery, claimed the trial court erred in refusing to admit into evidence, under the business records exception to the hearsay rule, two signed psychological evaluations of defendant, contained in a probate court file.

Held, under the business entry statute, "Opinions or diagnoses do not qualify." People v. Chambers, 236 N.W.2d 703 (Mich. App. 1975), 12 CLB 353.

§ 47.43. —Declarations made to doctor during examination

Indiana *See* Whitten v. State, 333 N.E.2d 86 (1975), 12 CLB 94, CLD § 53.09.

§ 47.45. —Declarations of co-conspirators

Court of Appeals, 4th Cir. *See* United States v. Truslaw, 530 F.2d 257 (1975), 12 CLB 608, CLD § 8.00.

Court of Appeals, 5th Cir. Four defendants were jointly tried for bank robbery. The trial court admitted, over defense objection, the testimony of the government's witness that one of the defendants had confessed to him his role in the robbery. The other three defendants argued that references in the confession testimony to dividing the money "four ways" and the location of the getaway car inculpated all the defendants.

Sustaining the conviction, the court held that Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968), requires exclusion of out-of-court confessions of codefendants "only when they directly inculpate the complaining co-defendants, as well as the declarant." The reference to the number of persons involved in the bank robbery, said the court, "presents little prejudice. The key fact to be proved is not that the robbery took place, or that it involved several participants, but that the defendants were the robbers." United States v. Hicks, 524 F.2d 1001 (1975), 12 CLB 196.

Court of Appeals, 7th Cir. *See* United States v. Buschman, 527 F.2d 1082 (1976), 12 CLB 610, CLD § 57.75.

§ 47.70. —Presumptions and inferences

Massachusetts The Massachusetts Supreme Judicial Court prospectively abolished its long-standing rule that gave a married woman the benefit of a rebuttable presumption that her acts in the presence of her husband were done under his duress or coercion.

As to whether *Mulaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975), "now requires that the prosecution negate duress or coercion, marital or otherwise, beyond a reasonable doubt," the court did not think it necessary to decide in the present case. Commonwealth v. Barnes, 340 N.E.2d 863 (1976), 12 CLB 478.

§ 48.65. Identification evidence—lie detector test

Kansas During the course of trial, defendant moved that he be allowed to take a lie detector test prior to the completion of trial and agreed to stipulate that the results would be admissible in evidence. The trial court accordingly ordered a polygraph test, the results of which further implicated defendant.

Upon resumption of trial, the polygraph test results were admitted in evidence after the examiner had testified in detail as to the operation of the machine and the manner in which the testimony was given. On appeal from his ensuing conviction, defendant contended it was error to admit the test results because his request for a polygraph test was based on erroneous knowledge as to its accuracy and he was unaware of the numerous faults inherent in such a testing system.

The Supreme Court of Kansas, affirming the conviction, held that the trial court did not err in admitting the polygraph results where the defendant had stipulated to their admissibility and the trial court had complied with the stated conditions for the admission of polygraph test results. State v. Lassley, 545 P.2d 383 (1976), 12 CLB 621.

Washington The State of Washington adheres to the majority rule that the results of a polygraph examination are inadmissible at trial absent a stipulation by both the defense and the prosecution. The court noted, however, that it was an unresolved question whether the results of a polygraph test of a *prosecution witness* (rather than of defendant) were admissible, absent a stipulation, under the rule of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), requiring the prosecution "to disclose any evidence which may tend to exculpate a defendant." State v. Carr, 537 P.2d 844 (Wash. App. 1975), 12 CLB 96.

§ 50.20. Opinion evidence (See also § 51.20.)

Florida In a rape prosecution the state produced a physician who testified, over defense objection, that his opinion from the history and from his examination was that the alleged victim had been raped.

Held, the opinion by the doctor that the victim had been raped was erroneously admitted into evidence:

"In light of the very closely drawn issues, and the fact that the cause of the one party's injuries were subject to reasonable conflicting claims, and in view of the fact that defendants' motion to strike the opinion testimony was denied, we hold the admission of the opinion testimony was reversible error, and that the cause must be remanded for a new trial."

Farley v. State, 324 So. 2d 662 (Fla. App. 1976), 12 CLB 478.

"Cross-Examination of a 'Voiceprint' Expert: A Blueprint for Trial Lawyers" by David M. Siegel, 12 CLB 509 (1976).

§ 50.25. Stipulations as evidence

Kansas *See* State v. Lassley, 545 P.2d 383 (1976), 12 CLB 621, CLD § 48.65.

Missouri Defendant, who was tried for the offense of offering violence to a prison guard, contended that the trial court erred in admitting evidence which showed that he had been convicted of first-degree robbery and was serving a ten-year sentence, since he had already admitted in voir dire that he was an inmate of the penitentiary. Thus, he argued, the only purpose for the additional proof was to prejudice the jury against him.

Held, the trial court had not erred since the "right of the state to offer . . . evidence which is relevant and material to the issue cannot be taken away by an offer for stipulation or by an admission." State v. Townes, 522 S.W.2d 22 (Mo. App. 1975), 12 CLB 93.

WITNESSES

§ 51.00. Competency

Virginia Defendant, the leader of a motorcycle gang, allegedly ordered the murder of his former girl friend by three female followers of the gang, one of whom testified against him at the trial. The defense relied heavily on the testimony of a male member of the gang, who contradicted the testimony of the state's witness.

The state sought to impeach him on cross-examination with an unsigned, handwritten letter, purportedly written by him to one of the perpetrators. The defense witness refused to admit or deny that he had written the letter and testified that he could not say that the handwriting was his.

The trial court then inquired whether the witness had trouble remembering, and defendant replied that he suffered from recurring blackouts and bouts of memory failure; that he had been in a mental institution the preceding year; that he was in need of medication for headaches; and that his nerves were shot. He then stated, in response to the court's question, that, in fact, he could not now remember whether he had just testified in court or not.

The court, over defense objection, held that the witness was not competent to testify, directed the jury to disregard the witness's testimony, and ordered that it be stricken from the record.

Held, in sustaining the conviction, that there was evidence to support the trial court's finding of incompetency, and the trial court had not erred in its ruling or in its instruction to the jury to disregard the testimony. Turnbull v. Commonwealth, 218 S.E.2d 541 (1975), 12 CLB 211.

§ 51.03. Coerced testimony

New York After a prospective witness in a second-degree murder case had refused a detective's request to come in for an interview, the district attorney's office served subpoenas upon her and her mother directing them, under penalty of criminal contempt, fine, and imprisonment, to appear in Supreme Court on a certain date. The address of the district attor-

ney's office was printed on the form. The case, however, was not on the calendar of that court, or any other court, that day. The witness and her mother, obeying the mock subpoenas, appeared and were questioned twice, the second time in the presence of a stenographer who prepared a transcript of the second interrogation.

Defense counsel moved to dismiss the indictment for murder on the ground of prosecutorial misconduct.

Held, notwithstanding that the district attorney's office acted "in accordance with what may have been a previously accepted practice," there could be no doubt, said the court, that it was contrary to law and the ABA Standards.

The statements taken were ordered suppressed and the district attorney was barred from using them or any evidence or information obtained from the illegal interviews. Furthermore, held the court, the "District Attorney shall bear the burden of convincing the trial court that evidence he seeks to introduce or information he seeks to employ in cross-examination was not obtained from the illicit interviews . . . but had an independent source." People v. Arocho, 379 N.Y.S.2d 366 (N.Y. Sup. Ct. 1976), 12 CLB 475.

§ 51.08. Attorney for one of the parties as witness

New Mexico The assistant district attorney prosecuting defendant for receiving a stolen vehicle was called as a rebuttal witness for the state. He testified to having been approached by the defendant who made certain statements to him (which, it appeared, were of critical importance to the state's case). The same assistant district attorney made the closing argument for the state during which he argued his own credibility to the jury.

This denied defendant a fair trial. It was "reversible error for a district attorney to be both witness and prosecutor. . . . When a district attorney finds it necessary to testify on behalf of the prosecutor, he should withdraw and leave the trial of the case to other counsel." State v. McCuistion, 537 P.2d 702 (1975), 12 CLB 90.

§ 51.10. Privileged communications

Court of Appeals, 8th Cir. Federal courts have followed the general common-law rule that one spouse cannot be a witness against the other in criminal cases. A well-established exception to this rule exists where one spouse commits an offense against the other.

In the instant case, a father was charged with sexual offenses against his child. The Eighth Circuit Court of Appeals expanded the scope of that exception to allow the testimony of one spouse against the other where the alleged crime has been committed against a child of either spouse.

In so holding, the court recognized that the general policy behind the husband-wife privilege is to foster family peace, but also noted that a serious crime against a child is an offense against that family harmony and to society as well.

The court noted, further, that the vast majority of reported child abuse cases occurred in the home, with a parent or parent substitute as the perpetrator. Moreover, said the court, there was strong state court authority for the proposition that a crime against a child of either spouse is a wrong against the other spouse, rendering antimarital testimony admissible. United States v. Allery, 526 F.2d 1362 ([N.D.] 1975), 12 CLB 459.

New York *See* People v. Rodriguez, 38 N.Y.2d 95, 375 N.Y.S.2d 665 (N.Y. App. 1975), 12 CLB 477, CLD § 44.00.

New York A patient in a narcotics rehabilitation center volunteered the information to narcotics parole officers that she had participated in a murder. With her consent, the police were notified, and she repeated this confession before a district attorney, naming the actual killer.

The prosecution then issued subpoenas to the narcotics parole officers to testify before the grand jury as to the statements the patient had first made to them. Relying on 21 U.S.C. § 1175 (Drug Abuse Office and Treatment Act of 1972), the narcotics parole officers moved to quash the subpoenas on the ground that the information sought was privileged and confidential.

Held, in denying the motion to quash, that the information sought did not constitute "records of identity, diagnosis, prognosis, or treatment," and was, therefore, not classified by the statute as confidential.

The privilege afforded by the confidentiality regulation, said the court, was to protect an addict undergoing treatment from public revelation of his addiction and the details of his treatment; but this privilege did not extend "to the gratuitous confession of criminal activity, which, as here, is unrelated to 'identity, diagnosis, prognosis or treatment.'" Anastasi v. Morgenthau, 373 N.Y.S.2d 751 (N.Y. Sup. Ct. 1975), 12 CLB 202.

§ 51.18. Witness's assertion of privilege against self-incrimination—effect (See also § 36.00.)

Michigan *See* People v. Gunne, 237 N.W.2d 256 (Mich. App. 1976), 12 CLB 471, CLD § 52.40.

Utah The trial court did not err in refusing to allow defendant to call a severed codefendant before the jury as a witness where it had been determined, out of the presence of the jury, that the codefendant would exercise his Fifth Amendment privilege to remain silent. Rejecting defendant's contention that the codefendant should have been forced to assert the Fifth Amendment in the presence of the jury, the court held that such a course would have permitted "presentation of inferential matter to the jury, which could only be speculative." State v. Travis, 541 P.2d 797 (1975), 12 CLB 202.

§ 51.20. Expert witness (See also § 52.20.)

Florida *See* Farley v. State, 324 So. 2d 662 (Fla. App. 1976), 12 CLB 478, CLD § 50.20.

Michigan Defendant allegedly sold a quantity of heroin to the complaining witness, a former addict. She was the only eyewitness to the crime. Over defense objection, the court permitted the state to qualify her as an expert witness, in which capacity she identified the substance sold to her as heroin.

In a case of first impression, the court held that a heroin addict may be an expert witness as to the identification of heroin. People v. Boyd, 236 N.W.2d 744 (Mich. App. 1975), 12 CLB 353.

"Cross-Examination of a 'Voiceprint' Expert: A Blueprint for Trial Lawyers" by David M. Siegel, 12 CLB 509 (1976).

§ 51.30. Immunity

Court of Appeals, 1st Cir. *See In re* Quinn, 525 F.2d 222 (1975), 12 CLB 342, CLD § 33.73.

§ 52.30. Cross-examination—impeachment by prior conviction

Michigan At defendant's trial for automobile theft, his young accomplice was the principal state witness against him. Defense counsel, in an effort to impeach the witness's credibility and character, sought to elicit the fact that prior to trial, the witness had been accorded a youthful-trainee status. The trial court, relying on a state rule limiting such cross-examination to prior convictions, excluded the evidence on the ground that under the statutory law, the witness's petition for youthful-trainee status did not constitute a conviction.

The Michigan Court of Appeals held that in the context in which defense counsel had sought to elicit the testimony, the

trial court had ruled properly. "Obviously," said the court, "it was defense counsel's belief that he should have been allowed to attack [the witness's] credibility and impeach his character by revealing . . . the serious charge against him, in accordance with the pre-*Falkner* state of the law," allowing such impeachment. However, now, noted the court, the rule of People v. Falkner, 389 Mich. 682, 209 N.W.2d 193 (1973), "very clearly limits cross-examination to convictions." People v. Crutchfield, 233 N.W.2d 507 (Mich. App. 1975), 12 CLB 212.

§ 52.40. —Impeachment by prior inconsistent statement

Michigan Central to the defense in a murder case was the alibi testimony of a witness. On cross-examination, the prosecutor attempted to introduce into evidence a tape-recorded telephone conversation between the witness and a third party, as a prior inconsistent statement of the witness, contradicting her testimony on direct examination. It became apparent, however, that the witness would exercise her Fifth Amendment privilege in response to any foundational questions necessary for the admission of the tape recording. When the prosecutor conceded that the foundation question might be incriminating, the trial court ruled that the introduction of the tape was permissible without the necessity of laying a foundation.

Held, the trial court had committed reversible error since no foundation had been laid for the admission of the tape. Said the court: "We hold that where, as here, a witness has exercised her Fifth Amendment privilege against self-incrimination in response to foundational questions put by the prosecutor, it is impossible to lay a foundation properly and therefore prior inconsistent statements cannot be shown." People v. Gunne, 237 N.W.2d 256 (Mich. App. 1976), 12 CLB 471.

West Virginia *See* State v. Spadafore, 220 S.E.2d 655 (1975), 12 CLB 352, CLD § 47.39.

§ 52.50. —Impeachment for bias or motive

Maryland The version of facts presented by the defendant in a nonjury rape case was that while in the company of the complaining witness, she had assaulted him without provocation with a knife. Defense counsel – seeking to demonstrate that the witness's motivation for bringing the rape charge was to seize the legal initiative in order to frustrate defendant's assault charge – attempted to question her on cross-examination as to defendant's threat. The trial court, however, sustained the state's objection to the question.

Reversing the conviction and remanding for a new trial, the court held that the trial judge's refusal to allow defense counsel to show bias, prejudice, or ulterior motive on the part of the complaining witness through cross-examination was a denial of due process as well as violation of defendant's Sixth Amendment right to be confronted with the witnesses against him. Deinhardt v. State, 348 A.2d 286 (1975), 12 CLB 362.

§ 52.60. —Impeachment for prior illegal or immoral acts

Oregon The trial court sustained the state's objection to the defendant's offer of proof that the alleged robbery victim had accepted a $100 bribe from the defendant's girl friend not to testify against defendant in the instant case.

Held, the trial court's refusal to allow defendant to impeach the credibility of the victim was reversible error.

This was not an attempt, said the court, to impeach by proof of a particular wrongful act, which is prohibited by statute. "Rather, it was an attempt to discredit the witness by showing that she had accepted a bribe not to testify against the defendant as to the very crime with which de-

fendant was charged." It was "in effect an attack on the witness's character and credibility." Therefore, it was not necessary to lay a foundation for its admission, as contended by the state. State v. Dowell, 541 P.2d 829 (Ore. App. 1975), 12 CLB 210.

§ 52.70. —Impeachment where issue not raised on direct examination

Georgia *See* Askew v. State, 217 S.E.2d 385 (Ga. App. 1975), 12 CLB 94, CLD § 47.10.

§ 52.90. —Use of unconstitutionally obtained evidence to impeach

California *See* People v. Disbrow, 127 Cal. Rptr. 360, 545 P.2d 272 (1976), 12 CLB 615, CLD § 2.70.

§ 53.09. "Opening the door" by pleading insanity

Court of Appeals, 9th Cir. *See* Karstetter v. Cardwell, 526 F.2d 144 (1976), 12 CLB 456, CLD § 45.39.

Indiana Where defendants in a murder case had pleaded not guilty by reason of insanity, the prosecutor, in cross-examining defendants' psychiatrist, was entitled to elicit information the defendants had related to the psychiatrist as to their prior crimes and criminal charges. Such information was admissible "as bearing upon the credibility of the conclusions drawn by the psychiatrist." By pleading not guilty by reason of insanity, defendants had "opened the door to evidence of relevant past behavior, including criminal behavior." Whitten v. State, 333 N.E.2d 86 (1975), 12 CLB 94.

§ 53.25. Res gestae witness

Michigan During a trial for armed robbery, it was disclosed that the victim had seen the three men who robbed him talking to a postman just prior to the time they entered his store. Although the postman was subsequently contacted by detectives, he was not endorsed as a witness on the information charging defendant with the crime, nor was he ever called as a witness. Defendant appealed, asserting reversible error because the prosecutor had failed to endorse upon the information the name of the alleged res gestae witness and to produce him at trial.

Held, in remanding for an evidentiary hearing, that reversible error would occur only if the postman was a res gestae witness, that is, if he had witnessed the crime, and, even in that event, only if his testimony could not be said to be cumulative. Since there was a rebuttable presumption that persons present at the time and place of the crime are res gestae witnesses, the prosecution bore the burden of proving otherwise. People v. Samuels, 233 N.W.2d 520 (Mich. App. 1975), 12 CLB 210.

DEFENSES

§ 54.08. Alcoholism and drug addiction

Michigan *See* People v. Chambers, 236 N.W.2d 703 (Mich. App. 1975), 12 CLB 355, CLD § 57.69.

"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

§ 54.10. Collateral estoppel

Court of Appeals, 10th Cir. Defendant, along with several others, was indicted for murder. Two of his codefendants were allowed to plead guilty to voluntary manslaughter. Defendant proceeded to trial and was convicted of first-degree murder. On appeal, he raised the contention that acceptance of his codefendants' pleas precluded his conviction for murder on the theory of res judicata, double jeopardy, or collateral estoppel. With respect to collateral estoppel, defendant argued that since a trial court may not (under the Federal Rules of Criminal Procedure, Rule 11) accept a guilty plea unless there is a factual basis for it, the court's finding that there was a factual basis for the plea

of manslaughter precluded the murder conviction of defendant.

The Tenth Circuit rejected all three theories and held, first, that res judicata could not apply because defendant was not a party to any of the plea bargaining and the adjudications based thereon did not affect him. Similarly, he was not placed in jeopardy by his codefendants' pleading guilty. As to collateral estoppel, said the court of appeals, "the court's finding that there is a factual basis for the plea of manslaughter is not necessarily a finding that the evidence supports this offense only." In any event, concluded the court, it did not foreclose any issue of murder as to defendant "because that was not litigated in the plea of guilty proceedings." United States v. Coppola, 526 F.2d 674 ([Kan.] 1975), 12 CLB 461.

Louisiana Defendant and another man (now dead) were allegedly observed fleeing the scene of the murder of two men. Although indicted for both murders, they were tried with respect to only one, and were acquitted. The jury's verdict read "not guilty due to insufficient evidence."

The state obtained a dismissal of the indictment charging the murder of the second man, and proceeded to reindict defendant for that crime. Defendant, invoking the doctrine of collateral estoppel, moved to quash the indictment on the ground of double jeopardy. The motion was granted, and the state appealed, contending that since defendant had failed to exercise his right to move for the consolidation of the two charges into one trial, he had waived his right under the Fifth and Fourteenth Amendments to claim that the later attempt to prosecute would place him in second jeopardy.

While the state's contention that defendant had a right to move for joinder of the two indictments prior to the first trial was "arguably well-founded," nevertheless, "that in itself does not mean that defendant waived his right to claim double jeopardy," said the court.

> "Since the doctrine of collateral estoppel has now been superimposed upon the double jeopardy clause of the Fifth Amendment and elevated to the dignity of a constitutional right we cannot presume acquiescence in the loss of such a right. . . . Such a waiver is not to be lightly inferred, . . . and it must be voluntarily and knowingly made. . . . There is no evidence to support any intention to waive double jeopardy here."

State v. Cain, 324 So. 2d 830 (1975), 12 CLB 472.

§ 54.15. Discriminatory enforcement

New Mexico The mere fact that defendant was tried four times for the same crime before he was ultimately convicted of murder did not deny him equal protection of the law and did not constitute cruel and unusual punishment. (Defendant had contended that since 1949, only one other defendant had been tried three times for the same offense, and that he was treated differently than any other defendant had been treated in at least twenty-four years, which not only denied him equal protection of the law, but also constituted cruel and unusual punishment).

In rejecting defendant's argument, the court stated: "The 'equal protection of the law' provisions of the United States and New Mexico Constitutions do not require uniform enforcement of the law and do not protect defendant from the consequences of his crime." State v. Lunn, 537 P.2d 672 (1975), 12 CLB 83.

§ 54.20. Double jeopardy—in general

United States Supreme Court Petitioner was indicted in New York for his refusal to answer questions before a grand jury investigating a murder conspiracy. He sought dismissal of the indictment on the grounds of double jeopardy, pointing out that, prior to his indictment, he had, as a result of the same refusal to testify, been

adjudicated in contempt of court and required to serve thirty days in jail. Unsuccessful in this challenge to the indictment, he entered a guilty plea on advice of counsel.

Thereafter, however, he appealed, claiming that the double jeopardy clause of the Fifth Amendment precluded the state from haling him into court on the charge to which he had pleaded guilty.

The United States Supreme Court reversed and remanded the case to the New York Court of Appeals for a determination of petitioner's double jeopardy claim on the merits, saying:

> "Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."

A counseled plea of guilty, the Court pointed out in an explanatory footnote, was an admission of "factual guilt" only. In the instant case, however, "the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore does not bar the claim." Menna v. New York, 96 S. Ct. 241 (1975), 12 CLB 191.

United States Supreme Court An Iowa motorist was involved in an automobile accident which took the lives of two persons. He was separately charged, by information and indictment, respectively, with reckless driving and manslaughter, and separately tried for each offense. He petitioned for writ of certiorari, alleging that his trial and conviction for manslaughter constituted double jeopardy because of his prior conviction for reckless driving based on the same occurrence.

The Supreme Court denied certiorari without comment.

The dissent (Brennan, Douglas, and Marshall, JJ.) argued that the double jeopardy clause of the Fifth Amendment "requires the joinder at one trial, except in extremely limited circumstances not present here, of 'all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction.'" Stewart v. Iowa, 96 S. Ct. 205 (1975), 12 CLB 192.

United States Supreme Court Petitioner was charged in a two-count indictment with robbery by assault and robbery by firearms. Both counts related to the same transaction. At the first trial, the court limited the state to trial on the *second* count. Petitioner was convicted under this count, but his conviction was reversed on appeal. Instead of proceeding to a retrial on the second count, however, the state, over defense objection of former jeopardy, tried him on the *first* count. This trial resulted in a conviction which was subsequently affirmed on appeal.

The Supreme Court denied certiorari without comment.

The dissent (Brennan, Douglas, and Marshall, JJ.) again argued that these circumstances fell within the double jeopardy requirement of the joinder at one trial of all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. Vardas v. Texas, 95 S. Ct. 206 (1975), 12 CLB 192.

Court of Appeals, 10th Cir. *See* United States v. Coppola, 526 F.2d 674 (1975), 12 CLB 461, CLD § 54.10.

Louisiana *See* State v. Cain, 324 So. 2d 830 (1975), 12 CLB 472, CLD § 54.10.

Louisiana Defendant pleaded guilty to a felony upon representation by his attorney that the district attorney would not thereafter have him charged as a multiple offender. He was sentenced to seven years at hard labor. Later, when the district attorney told defendant that he was to be charged as a multiple offender, defendant filed a motion to withdraw his

guilty plea. The trial court granted the motion, holding that the guilty plea had been involuntary.

As the matter proceeded toward trial for the second time, defendant again entered a guilty plea, this time with the firm assurance of the district attorney that he would not be charged as a multiple offender. The prison sentence, however, was to be for fourteen years – twice the length of the former sentence.

On appeal, defendant raised the issue of double jeopardy. Pointing to a state provision which permits a guilty plea to be withdrawn only *prior* to sentencing, he argued that the court had lacked the authority to permit withdrawal of the first guilty plea, and the seven-year sentence resulting from that plea remained in effect. Hence, he reasoned, the second guilty plea and sentence to fourteen years, based upon the same charge, placed him in double jeopardy.

The Supreme Court of Louisiana agreed with defendant that the trial court lacked authority to permit the withdrawal of the first guilty plea after sentence, and that the first sentence was, therefore, in full force and effect. This being so, the second guilty plea and sentence could not stand, since defendant could not be twice put in jeopardy.

The court, however, refused to set aside the first guilty plea, notwithstanding that the trial judge had found that it was not free and voluntary, because "that determination by the trial judge was made by virtue of a hearing held after sentence which the law did not authorize." The question of the free and voluntary character of the first guilty plea would be relegated, "in the interest of orderly procedure," to a proper proceeding for review, either by an out-of-time appeal or by habeas corpus petition. State v. De Manuel, 321 So. 2d 506 (1975), 12 CLB 206.

North Carolina The state attempted to retry defendant for armed robbery after the appellate court had reversed the original conviction for insufficiency of the evidence and had found that the trial court should have charged the jury only on the lesser-included offense of accessory before the fact. The trial court granted a defense motion to dismiss the armed robbery charge but did not preclude trial upon any lesser offense. The state appealed.

Held, in affirming the order, that the double jeopardy clause protected defendant against retrial for armed robbery after reversal for insufficient evidence. It did not, however, preclude trial on a lesser-included offense if the evidence at the first trial was sufficient to support a conviction of the lesser offense. State v. Alston, 216 S.E.2d 416 (1975), 12 CLB 89.

Texas After the jury had been selected and sworn, but *prior to the introduction of any evidence*, the defense attorney pointed out to the court that the indictment alleged an impossibility, namely that the offense had been committed at a date subsequent to the present date. Instead of pursuing the proper course of treating this as a motion to quash and dismissing, the trial court directed the jury to acquit.

Defendant was reindicted under a corrected date. He pleaded "former acquittal."

Held, in affirming the conviction, that inasmuch as no conviction was possible on the indictment alleging an impossible date, and since no evidence had been presented bearing upon defendant's guilt or innocence, the first indictment was a nullity, and hence, the jurisdiction of the court had not been properly invoked. The fact that defendant's first trial ended with an instructed verdict of acquittal, rather than dismissal, did not change the actual situation and could not be considered as determinative. Thompson v. State, 527 S.W.2d 888 (Tex. Crim. App. 1975), 12 CLB 207.

§ 54.25. —Separate and distinct offenses

New Hampshire While operating a motor vehicle, defendant was stopped, arrested, and charged with driving while intoxicated, with possession of marijuana, and with operating a motor vehicle while knowingly having in possession a controlled drug. A separate complaint was drawn for each alleged violation, and the prosecutor chose to prosecute all violations charged. Defendant moved, in advance of trial, to dismiss either of the drug-related charges on the grounds of double jeopardy, maintaining that the possession charged was necessarily incidental to the transportation offense.

Denying the motion to dismiss, the court held that:

> "It is clear that double jeopardy does not prevent the threat of twice being punished for the same act, but instead it forbids twice being tried and convicted for the same offense. . . . The defendant here has been merely charged with two drug-related offenses arising from the same act and both are being prosecuted. This does not constitute double jeopardy."

State v. Goodwin, 351 A.2d 59 (1976), 12 CLB 473.

§ 54.62. —Reason for granting mistrial

New Mexico Defense counsel's challenge to a police officer witness to take a lie detector test (in New Mexico, polygraph results are inadmissible in evidence) resulted in the trial court's sua sponte declaration of a mistrial. *Held*, in reversing the conviction following retrial, that this isolated reference to lie detectors, did not constitute "a type of misconduct that would go to the very vitals of the trial itself such as tampering with the jury." The trial court's lack of effort to give a curative instruction to the jury and the absence of any effort to "assure that there was a manifest necessity for the sua sponte declaration" of the mistrial, rendered defendant's subsequent reprosecution a violation of his right under the Fifth Amendment not to be put in jeopardy twice for the same offense. State v. Sedillo, 539 P.2d 630 (1975), 12 CLB 90.

§ 54.64. Entrapment—in general

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 54.69. Immunity from prosecution

Court of Appeals, 8th Cir. *See In re* Long Visitor, 523 F.2d 443 (1975), 12 CLB 198, CLD § 23.85.

§ 55.60. Lack of jurisdiction

Court of Appeals, 9th Cir. A police officer, who was employed by an Indian tribe to police the reservation, searched a truck camper driven by defendant, a Mexican who spoke no English, after he had frisked defendant, looking for identification papers, which he did not find. Upon opening the camper door, he discovered burlap sacks containing marijuana. The officer arrested defendant and held him for transfer to the federal drug enforcement authorities.

Appealing his ensuing conviction on drug importation charges, defendant cited cases holding that Indian tribes may not exercise criminal jurisdiction over non-Indians.

Affirming the conviction, the court held that irrespective of any previous holdings, tribal authorities have the "sovereign power . . . to exclude trespassers who have violated state or federal law by delivering the offenders to the appropriate authorities." Ortiz-Barraza v. United States, 512 F.2d 1176 (1975), 12 CLB 81.

§ 55.70. Res judicata

Court of Appeals, 10th Cir. *See* United States v. Coppola, 526 F.2d 674 (1975), 12 CLB 461, CLD § 54.10.

Idaho Defendant was convicted of arson. Subsequent to his conviction, he was brought to trial in a civil action for damages instituted by the owner of the damaged premises. A jury unanimously found for the defendant. On appeal from his arson conviction, defendant cited several cases in support of his contention that the subsequent civil determination of his innocence of wrongdoing required reversal of the criminal conviction.

Sustaining the conviction, the court held that "the proper rule is that when a defendant is convicted in a criminal case a subsequent judgment in favor of the same individual in a civil action cannot be used to impeach the prior conviction." State v. Johnson, 536 P.2d 295 (1975), 12 CLB 94.

§ 55.80. Self-defense—in general

New Jersey Defendant was entertaining a male friend when her estranged husband forced his way into her apartment, attacked them both with his hands, and announced his intention of killing her. While he and her friend fought, she broke away, ran into the kitchen, and returned with a knife. When he renewed his attack upon her, she stabbed him once. He died from the wound.

Defendant pleaded self-defense. On trial, it was proved that the apartment had been occupied by the married couple prior to their separation; that at the time of the separation, the husband had tried to force her to move out and, failing that, had moved out himself; that later he had moved back in again for a short time and moved out again; and, finally, that at the time of the stabbing, the wife had occupied the apartment alone with a female cousin.

Held, the trial judge did not err in charging that defendant had a duty to seek safe retreat, if available, notwithstanding the fact that the apartment which had been the matrimonial domicile was no longer in fact occupied by the husband. Under the circumstances, said the court:

> "We are not here prepared to say that the separation in the matter before us so conclusively terminated all right in the husband to be there that the wife was entitled to kill without respect to the availability of completely safe retreat, if such existed."

State v. Lamb, 134 N.J. Super. 575, 342 A.2d 533 (1975), 12 CLB 98.

§ 55.92. —Escape from intolerable prison conditions

Texas A prison inmate who fled a jail, allegedly to seek legal aid and to escape from sordid jail conditions, was convicted of the crime of escape. He contended on appeal that the trial judge had erred in refusing to charge that it was a defense that the conduct in question was justified, or that such conduct would be justified if the actor reasonably believed that the conduct was immediately necessary to avoid imminent harm.

The court rejected defendant's contention and affirmed the conviction. Said the court, "numerous cases from other jurisdictions have held that intolerable living conditions in prison afforded no justification for escape." Branson v. State, 525 S.W.2d 187 (Tex. Crim. App. 1975), 12 CLB 98.

§ 56.00. —Threats by victim

Texas *See* Young v. State, 530 S.W.2d 120 (Tex. Crim. App. 1975), 12 CLB 356, CLD § 58.53.

§ 56.20. Statute of limitations

Illinois *See* People v. Hawkins, 340 N.E.2d 223 (Ill. App. 1975), 12 CLB 473, CLD § 34.22.

§ 56.35. Unconstitutionality of statute or ordinance—equal protection

Arizona *See* State v. Callaway, 542 P.2d

1147 (Ariz. App. 1975), 12 CLB 215, CLD § 81.45.

§ 56.39. —Procedural matters

District of Columbia Defendant was convicted for possession of the implements of a crime (narcotics paraphernalia) in violation of the D.C. Code. On appeal, he contended that the statutory provisions permitting a possessor to advance an affirmative defense of innocent possession impermissibly shifted the burden of proof to the defense in the light of Mullaney v. Wilber, 421 U.S. 684, 95 S. Ct. 1881 (1975).

The court of appeals, sustaining the conviction, held that *Mullaney* was inapplicable to the statute under consideration. The United States Supreme Court, in *Mullaney*, had observed that there was "no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability" as malice. In the instant case, however, said the court of appeals, "only the accused could know of possible innocent reasons why he may have possessed the implements of a crime, and it does not violate due process to require him to give a satisfactory explanation for otherwise validly presumed criminal possession." James v. United States, 350 A.2d 748 (D.C. App. 1976), 12 CLB 621.

§ 56.40. —Violation of First Amendment

Illinois An Illinois statewide juvenile curfew law, which made it unlawful for a person under 18 years of age to be present at or upon any public assembly, building, place, street, or highway for a period of six or seven hours each night unless accompanied by a parent, legal guardian, or other responsible adult, or unless engaged in a business or occupation, was unconstitutional as an unwarranted infringement upon First Amendment rights of freedom of speech, association, assembly, and religion, and was incompatible, in general, "with the basic principles upon which free societies are founded." People v. Chambers, 335 N.E.2d 612 (Ill. App. 1972), 12 CLB 216.

Ohio Defendant was peacefully distributing leaflets to passersby in the enclosed area of a privately owned multistore shopping mall and was standing directly in front of a retail store with which his union had a labor dispute. The leaflets advised of the dispute and urged the recipients to boycott the store. Upon refusing a request to desist or leave, defendant was arrested and charged with criminal trespass.

Held, in dismissing the case, that a shopping mall was the functional "equivalent of a community business district," within the meaning of Amalgamated Food Employees Union Local 500 v. Logan Valley Plaza, 391 U.S. 308, 88 S. Ct. 1601 (1968), and "was therefore imbued with public attributes for First Amendment purposes." State v. Rose, 44 Ohio Misc. 17, 335 N.E.2d 758 (1975), 12 CLB 218.

§ 56.42. —Obscenity

United States Supreme Court *See* McKinney v. Alabama, 96 S. Ct. 1189 (1976), 12 CLB 605, CLD § 81.10.

§ 56.45. —Void for vagueness

United States Supreme Court Statutes prohibiting "crimes against nature" have been "broadly" interpreted by some states to include cunnilingus and other "sexual aberrations." Other states, however, have narrowly construed the same wording.

In the instant proceeding for habeas corpus, a Tennessee state prisoner asserted that, inasmuch as Tennessee had never specifically interpreted its statute to include the act of cunnilingus, the statute as applied to him had deprived him of his due process right to a "fair warning" and was unconstitutionally vague.

"All the Due Process Clause requires,"

the Court initially noted, "is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden." The Court found that the Tennessee courts had clearly indicated the broad coverage of the statute, citing a 1955 Tennessee decision holding that crimes against nature included fellatio; a later Tennessee case that had cited with approval a Maine decision to the effect that the prohibition encompassed "all unnatural copulation . . . including sodomy"; as well as relying on the construction of the Maine statute (which the Tennessee court had equated with the Tennessee statute), which had been applied to cunnilingus.

The dissent took issue with the Court's reliance on another state's construction, stating:

> "I simply cannot comprehend how the fact that one state court has judicially construed its otherwise vague criminal statute to include particular conduct can, without explicit adoption of that state court's construction by the courts of the charging State, render an uninterpreted statute of the latter State also sufficiently concrete to withstand a charge of unconstitutional vagueness."

Rose v. Locke, 96 S. Ct. 243 (1975), 12 CLB 193.

United States Supreme Court *See* United States v. Powell, 96 S. Ct. 316 (1975), 12 CLB 336, CLD § 83.08.5.

Ohio A mother who inflicted severe bruises on her young child's arms, face, nose, and forehead contended that the statute proscribing excessive corporal punishment of children was unconstitutionally vague and overbroad, and that the word "corporal" was fatally vague as employed and could not be construed as applying to areas of the child's body other than the trunk.

Held, in affirming the conviction, that the ordinary meaning of the word "corporal" logically embraced the entire body, including the extremities (i.e., head, hands, feet, legs, etc.), and not merely the trunk. The statute was not unconstitutionally vague nor overbroad "since a person of ordinary sensibilities and intelligence should be capable of ascertaining its meaning and abiding by its proscriptions," concluded the court. State v. Rogers, 44 Ohio App. 2d 280, 337 N.E.2d 791 (1975), 12 CLB 220.

Utah A statute making it a misdemeanor when a person "intentionally interferes with a person recognized to be a law enforcement official seeking to effect an arrest or detention of himself or another regardless of whether there is a legal basis for the arrest," was unconstitutionally vague. Said the court: "We are of the opinion that the language of the statute as above pointed out fails to inform an ordinary citizen who is seeking to obey the laws as to the conduct sought to be proscribed." State v. Bradshaw, 541 P.2d 800 (1975), 12 CLB 215.

"Street Patrol: The Decision to Stop a Citizen" by Robert L. Bogomolny, 12 CLB 544 (1976).

§ 56.55. —Violation of Sixth Amendment

United States Supreme Court *See* Herring v. New York, 95 S. Ct. 2550 (1975), 12 CLB 74, CLD § 7.50.

D. THE JURY

JURY INSTRUCTIONS

§ 57.00. "Allen" dynamite charge

Tennessee After the jury foreman reported that the jury was unable to arrive at a verdict, the trial judge elicited from the foreman that the jury was hung on the question of guilt or innocence and that the division of jurors on that question was eleven to one. The trial judge then proceeded to deliver to the jury an *Allen* or "dynamite" charge to the effect

that a "dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many other men, equally honest, and equally intelligent with himself," and concluded with the admonition that *"the minority should listen to the views of the majority with the disposition of being convinced."*

The Supreme Court of Tennessee, reversing the conviction, held that the *Allen* charge was impermissible under Tennessee law "as being tantamount to a judicially mandated majority verdict."

The court further held that the trial judge had erred in inquiring of the reporting jury foreman as to the division of the jury. Said the court,

> "Until the jury shall have reached a verdict, no one – not even the trial judge – has any right, reason or power to question the specifics of its deliberative efforts."

Kersey v. State, 525 S.W.2d 139 (1975), 12 CLB 91.

§ 57.05. Accomplice testimony

North Carolina Failure of the trial court to instruct the jury that a witness was an accomplice, therefore an interested witness, and that her testimony should be carefully scrutinized was, in view of defendant's request, and the facts supporting it, prejudicial error. The fact that the witness had previously pled guilty to accessory after the fact to murder would not, ipso facto, make her an accomplice of defendant. However, the testimony of the witness herself was enough to convict her on the theory that she at least aided and abetted defendant. On this evidence, the trial court should have given an accomplice instruction. State v. White, 215 S.E.2d 557 (1975), 12 CLB 92.

§ 57.35. Circumstantial evidence

Texas The state was bound by its allegations in the indictments to prove beyond a reasonable doubt that defendants had robbed the complainant with a *pistol.* The state contended that the use of a pistol was shown by direct "earwitness" evidence. That is, the testimony of the complainant that he heard one defendant tell the other to put his "shit" on the complainant, and that this was ghetto slang for "iron," which he understood to mean a pistol. The complainant also testified that he heard what he thought was a pistol being cocked, although he admitted he never saw a pistol at any time.

The court rejected the contention that this was direct "earwitness" evidence, saying:

> "'All of the evidence adduced was direct evidence as to the facts deposed to but indirectly as to the factum probandum of the alleged offense.'"

Accordingly, the trial court committed reversible error in failing to grant defendant's special requested charge on circumstantial evidence. Moore v. State, 531 S.W.2d 140 (Tex. Crim. App. 1976), 12 CLB 479.

§ 57.42. Credibility of witnesses—in general

"Abolishing Cautionary Instructions in Sex Offense Cases: People v. Rincon-Pineda" by Robert L. Eisenberg, 12 CLB 58 (1976).

§ 57.69. Intent and willfulness

Michigan At his trial, defendant relied upon intoxication as his defense to armed robbery, a crime requiring "specific intent." Convicted, defendant appealed, contending that the trial court had committed reversible error by improperly instructing the jury on intoxication under the "capacity" standard, rather than the "Cooley" standard.

Held, the trial court committed reversible error in not properly instructing under the Cooley standard, even though the defendant failed to object in the prior

proceedings: The test is not whether defendant had the capacity to form the requisite intent, but whether defendant, in fact, had the required specific felonious intent. People v. Chambers, 236 N.W.2d 703 (Mich. App. 1975), 12 CLB 355.

§ 57.70. Lesser included offenses

Court of Appeals, 8th Cir. *See* United States v. Belt, 516 F.2d 873 (1975), 12 CLB 81, CLD § 66.90.

Michigan The trial judge instructed the jury in a manslaughter case, "If you find either of the defendants not guilty of the charge of manslaughter then you should proceed to determine whether that defendant . . . is guilty of the crime of assault and battery."

Held, the instruction was "unrealistic" and improperly interfered with the jury's deliberations. "Under the judge's instruction, even if the jurors were 11 to 1 for acquittal and a significant number of jurors desired to discuss the possibility of convicting the defendant of a lesser offense, consideration of a lesser offense could not begin unless the one juror holding out for conviction were dissuaded from that view." People v. Hurst, 238 N.W.2d 6 (1976), 12 CLB 479.

§ 57.75. Limiting and cautionary instructions

Court of Appeals, 2d Cir. *See* United States v. Lobo, 516 F.2d 883 (1975), 12 CLB 78, CLD § 8.00.

Court of Appeals, 7th Cir. Federal agents, approaching defendant through two of his associates, purchased a supply of arms from him. Although his confederates were also indicted, defendant was tried alone on charges of knowingly engaging in the business of dealing in firearms without being licensed and of knowingly receiving and possessing firearms after being convicted of a felony. While defendant was not charged with a conspiracy, the government successfully offered hearsay testimony concerning statements incriminating defendant made by his associates under a "joint venture" exception to the hearsay rule.

At the time of the admission of these statements, defense counsel requested that the jury be instructed that it could not consider the hearsay as evidence unless and until the government subsequently established beyond a reasonable doubt that there was a joint venture and that the joint venture must be established by independent evidence.

The trial court denied the request on the ground that it was at that point unnecessary to "burden this jury with the conditional character of the evidence," but that should the government fail to establish the joint venture by independent evidence, the court would grant a motion for mistrial. Such independent evidence was later forthcoming, and, in its final charge to the jury, the court gave the appropriate instructions concerning the hearsay testimony.

The Court of Appeals for the Seventh Circuit affirmed the conviction. The court acknowledged the existence of a joint venture exception to the hearsay rule virtually identical to the conspiracy exception. The court went on to hold that while it would generally be the better practice, upon timely request, to give such cautionary instruction at the time of the conditional reception of hearsay under the joint venture or conspiracy exceptions, the trial court in the instant case had not abused its discretion under the circumstances. United States v. Buschman, 527 F.2d 1082 ([Wis.] 1976), 12 CLB 610.

Court of Appeals, 10th Cir. Where it was clear to all parties concerned that the government informant intended to invoke his Fifth Amendment right not to testify, and defendant did not challenge the validity of the informant's claim of privilege, then it was "well within the discretion of the trial court to refuse to allow the informant to be called to the witness stand and

be compelled to thereafter invoke his Fifth Amendment right in the presence of the jury, thereby permitting the jury to draw inferences, whatever they might be, from the mere fact that the witness chose to assert a right given him by the Constitution."

The trial judge's "neutralizing" instruction was proper and served to put the entire matter in context. He had instructed the jury that

> "There has been testimony in this case about an informant named Samuel Hudson. As a result of a hearing held outside the presence of the jury, the Court has determined that Mr. Hudson is not available to be called as a witness by either side in this case.
>
> "The jury may not draw any inference from the fact that Samuel Hudson did not appear as a witness in this case."

United States v. Martin, 526 F.2d 485 ([Colo.] 1975), 12 CLB 458.

New York Although the consolidation of two separate indictments was proper, defendant was deprived of a fair trial where the court improperly declined defense counsel's request that

> "[T]he Court instruct the jury to consider each indictment individually and that the evidence regarding each crime be confined to that crime and not considered cumulatively."

People v. Range, 373 N.Y.S.2d 573 (App. Div. 1st Dep't 1975), 12 CLB 213.

"Abolishing Cautionary Instructions in Sex Offense Cases: People v. Rincon-Pineda" by Robert L. Eisenberg, 12 CLB 58 (1976).

§ 58.50. Prejudicial comments by trial judge during charge

New York *See* People v. Rodriguez, 38 N.Y.2d 95, 375 N.Y.S.2d 665 (N.Y. App. 1975), 12 CLB 477, CLD § 44.00.

§ 58.53. Self-defense

Texas Defendant, pleading self-defense to the charge of murder, testified that the deceased had threatened him while he was in the penitentiary, that he went to see the deceased at his home in order to settle the matter peacefully, but that just for protection, he took a gun along.

The trial judge charged the jury on self-defense, but limited defendant's right of self-defense by giving instructions on "provoking the difficulty." In view of the provocation instruction, defense counsel requested and was refused the following charge:

> "You are further instructed as a part of the law that the defendant . . . had the right to go to the house of the deceased on the occasion of the homicide for the purpose of seeking an amicable adjustment of their difference; and, if he feared an attack upon him by deceased, he had the right to arm himself before going to deceased's home, for the purpose of protecting himself from any such anticipated attack; and his right of self-defense would not in any manner be cut off or abridge for thus acting."

Held, the failure of the trial court to grant the requested charge on defendant's right to arm himself and seek an explanation constituted reversible error. The long-standing rule in Texas is

> "[I]f the court's instruction limits the accused's right of self-defense by a charge on provoking the difficulty, then the jury should be advised in a proper instruction under the facts that the accused's right of self-defense would not necessarily be abridged by the fact that he carried arms to the scene of the difficulty if such instruction is supported by the evidence."

Young v. State, 530 S.W.2d 120 (Tex. Crim. App. 1975), 12 CLB 356.

§ 59.18. Reasonable doubt

Court of Appeals, 6th Cir. Defendant failed to object to the judge's charge that

> "While it is necessary that every essential element of the crime charged in the indictment in this case be proved by evidence beyond a reasonable doubt, it is not necessary that each subsidiary fact should be proved beyond a reasonable doubt."

He was convicted, and on appeal, asserted that the instruction was confusing to the jury in that "(a) it detracted from the requirement of proof beyond a reasonable doubt; and (b) because the jury, in the absence of any definition or explanation of 'subsidiary fact,' could not possibly have known what facts were not required to be proved beyond a reasonable doubt."

Held, that since no objection was made to the instruction, it could not be the basis for reversal unless it was plain error; that where the charge as a whole amply and fully defined the appropriate standard, such "slightly misleading statements," standing alone, or in isolation, did not constitute plain error. United States v. Buffa, 527 F.2d 1164 ([Ohio] 1975), 12 CLB 612.

JURY SELECTION, DELIBERATION, AND VEDICT

(Right to jury trial. *See* § 43.45.)

§ 60.00. Requirement of an impartial jury—in general

Court of Appeals, 3d Cir. *See* United States *ex rel.* Greene v. New Jersey, 519 F.2d 1356 (1975), 12 CLB 77, CLD § 75.35.

§ 60.05. —Selection of veniremen

District of Columbia *See* Britton v. United States, 350 A.2d 734 (D.C. Ct. App. 1976), 12 CLB 475, CLD § 35.56.

§ 60.08. —Systematic exclusion of blacks, etc.

Tennessee A black murder defendant filed a plea in abatement on the ground of systematic exclusion of blacks from grand and petit juries in the county of the trial.

Held, the trial judge had properly held that no evidentiary hearing was required on the allegations that the grand jury was selected by a white judge and that no black could be elected to that office, since these allegations were not "evidence of systematic exclusion in the selection of grand juries." The same rule applied to the allegation that no black had ever been appointed a jury commissioner. Reasoned the court: "The greatest strictness prevails in the construction and application of pleas in abatement. They must possess the highest degree of certainty known to the law in every particular."

The court did, however, remand for an evidentiary hearing on the procedure used to select prospective jurors in this case. Defendant's assertion that the judges and/or jury commissioners had deliberately limited the number of blacks selected for grand and petit jury service on account of race merited consideration, said the court, and was not conclusory, as contended by the state. Moreover, held the court, decisions ruling that there was no systematic exclusion of blacks in the county did not "foreclose the defendant in his attempt to prove" there was. State v. Jefferson, 529 S.W.2d 674 (1975), 12 CLB 208.

§ 60.09. —Capital cases

Alabama In 1975, the Alabama Supreme Court held that cases classified as capital offenses prior to Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972), did not lose that status because of the elimination of the death penalty. By statute, a person accused of a capital offense is entitled to strike a jury from a special venire of forty-eight veniremen.

On appeal from conviction for rape, defendant contended that the trial court erred in refusing to allow defendant to strike a jury from forty-eight veniremen although rape had been classified as a capital offense.

Held, in affirming the conviction, that defendant was not entitled to a special venire.

> "We do not believe the Alabama Supreme Court intended that its decision should be extended to require a special venire in cases where the death penalty cannot be imposed."

Fisher v. State, 328 So. 2d 311 (Ala. Crim. App. 1976), 12 CLB 623.

Oklahoma State enacted legislation in 1974 mandating the death penalty for first-degree murder. On appeal from his conviction and death sentence, defendant contended that the death sentence could not be imposed because the jury "was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968).

The Court of Criminal Appeals of Oklahoma, sustaining the conviction, reaffirmed its position that the "application of *Witherspoon* was limited to those cases where the jury has discretion to resolve whether the defendant shall suffer death or some lesser degree of punishment upon conviction for the offense charged." Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975), 12 CLB 209.

§ 60.70. Exposure of jurors to prejudicial publicity

United States Supreme Court *See* Nebraska Press Ass'n v. Stuart, 96 S. Ct. 251 (1975), 12 CLB 189, CLD § 92.40.

Court of Appeals, 3d Cir. *See* United States *ex rel.* Greene v. New Jersey, 519 F.2d 1356 (1975), 12 CLB 77, CLD § 75.35.

South Carolina The trial court refused to excuse for cause ten jurors who had stated on voir dire that they had concluded from the news media that the two victims had died as a result of unlawful means. On appeal from his conviction for murder, defendant argued that since the state bore the burden of proving that the bodies exhumed from the grave were those of the victims with whose death he was charged, and the burden of proving that they had in fact died by unlawful means, it was prejudicial to seat jurors who had already formed an opinion adverse to defendant relating to these questions.

Held, in sustaining the conviction, that where the identification of the bodies and the manner of death – strangulation – were established "beyond debate," and where the only real issues in the case were whether defendant had perpetrated the deed and whether he was insane at the time, defendant had not been deprived of a fair trial. State v. Valenti, 218 S.E.2d 726 (1975), 12 CLB 209.

§ 61.13. Deliberation—time element as error

Vermont On appeal from his conviction for murder, defendant asserted error in the fact that the jury had deliberated less than forty-seven minutes in reaching their verdict.

Held, there was no error. Said the court, "Where the trial court record shows strong evidence of guilt, a lack of complex legal issues, and a proper charge by the court, no error can be shown in the shortness of time taken by a jury in arriving at their verdict." State v. Killary, 349 A.2d 216 (1975), 12 CLB 357.

§ 62.00. Verdict—general verdicts

South Dakota A South Dakota statute provides that upon the rendering of a verdict, the court clerk "must immediately

record it in full upon the minutes and must read it to the jury and *inquire of them whether it is their verdict.*"

Held, in sustaining the conviction, that while ordinarily it would be reversible error for the court clerk to fail to inquire of the jury whether the verdict was theirs, the defendant "affirmatively waived his statutory right" to such procedure when he declined to poll the jury, since polling is designed to ascertain with greater certainty the accuracy of a verdict. State v. Hoover, 236 N.W.2d 635 (1975), 12 CLB 356.

§ 63.30. —Use of "Allen" dynamite charge on deadlocked jury (See § 57.00.)

Tennessee *See* Kersey v. State, 525 S.W.2d 139 (1975), 12 CLB 91, CLD § 57.00.

E. SENTENCING AND PUNISHMENT
SENTENCING PROCEDURES

§ 65.65. Standards for imposing sentence

Court of Appeals, 4th Cir. Where plea bargain arrangement was that the government would make no recommendation as to sentence, but would inform the court of the extent of defendant's cooperation in the prosecution of his codefendant, the revelation that defendant had telephoned the codefendant's attorney with an offer not to testify against codefendant in return for $700 was properly before the sentencing court. Further, the sentence imposed was within the limits allowed by the Federal Youth Corrections Act and was well within the sound discretion of the trial judge. United States v. Crowe, 516 F.2d 824 (1975), 12 CLB 81.

Arkansas The Supreme Court of Arkansas upheld the constitutionality of a statute which reinstated the death penalty after the decision in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). The court, moreover, did not believe that the only way of meeting the rationale of *Furman* was to eliminate seemingly capricious inconsistencies in applying the death sentence by making it mandatory for certain offenses. Said the court:

> "We do not understand *Furman* to prohibit an exercise of discretion in the imposition or non-imposition of capital punishment, if the choice is made reasonably.
>
> "Act 438 requires that the jury first determine whether the defendant is guilty of a capital felony. If there is a finding of guilt the jury then hears evidence of aggravating or mitigating circumstances, which are enumerated in the act. The jury then retires again and decides whether the punishment is to be death or life imprisonment without parole. The jury must make a written finding with respect to the various aggravating and mitigating circumstances. Hence the basis for the verdict is known and can be compared with the punishment imposed in other cases."

Collins v. State, 531 S.W.2d 13 (1976), 12 CLB 461.

Georgia *See* Morgan v. State, 221 S.E.2d 47 (1975), 12 CLB 462, CLD § 5.25.

Louisiana The fact that the trial judge had no authority to request that the sentence of defendant be served without benefit of parole, probation, or suspension of sentence, did not prohibit him from making such a recommendation. State v. Fisher, 321 So. 2d 519 (1975), 12 CLB 217.

Montana Under a state statute, a person under the age of twenty-one, upon his first conviction for possession of dangerous drugs, "is presumed to be entitled to a deferred sentence." It had been previously held that to overcome the "presumption," there must be substantial evidence of "aggravating circumstances over and above the simple facts of a prima facie case."

In the instant case, nineteen-year-old defendant pleaded guilty to a reduced charge of possession of marijuana. Defendant claimed that two unknown hitchhikers had left it in his car. The judge, believing this to be a palpable lie, declined to give him a deferred sentence.

Held, in vacating the judgment and remanding with directions to impose a deferred sentence, "defendant's lack of candor before the trial court was not, in our opinion, sufficient to classify it as one of those aggravating circumstances necessary to overcome the presumption of a deferred sentence." State v. Burris, 542 P.2d 1223 (1975), 12 CLB 217.

"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

§ 65.68. Invalid conditions

Wisconsin The trial court, in sentencing defendant to twenty-five years in prison, specified the following:

> "As a condition of this sentence he is to be given opportunity to complete high school education, to obtain vocational training. It is the intention of this Court, this Court will monitor the defendant's care and treatment in regards to his incarceration. Court expects the Dept. of Health & Social Services to effect the conditions of the sentencing herein."

Held, the trial court acted in excess of its jurisdiction in specifying by order the condition of the defendant's confinement in the state prison. "Any claim of continuing control the trial court may have ceased when a defendant is sentenced and the sentence is executed." State v. Gibbons, 237 N.W.2d 33 (1976), 12 CLB 360.

§ 65.96. Power to dismiss habitual criminal charge

Washington Defendant, who had been convicted of several prior crimes, pleaded guilty to assault with a deadly weapon. The state thereafter filed a supplemental information charging defendant with having attained the status of a habitual criminal. Defendant moved to dismiss the supplemental information pursuant to CrR 8.3(b).

On appeal, the state contended that (1) a habitual criminal charge involves a "status," and consequently is not a new crime or "criminal prosecution" within the meaning of the Rule; and (2) the court could not dismiss the charge on equitable grounds absent a showing of arbitrary action or governmental misconduct.

The Supreme Court of Washington rejected the first contention, holding that a habitual criminal proceeding "is innately a special type of 'criminal prosecution,'" as that term is used in the Rule, and that the court has the authority to dismiss a habitual criminal charge "independently of other criminal allegations *if done for the purposes within the ambit of the authority vested in the trial court under CrR 8.3(b).*"

However, as to the state's second contention, the court held that "our case law clearly requires a showing of governmental misconduct or arbitrary action by the trial judge or prosecutor in order to dismiss an habitual criminal charge under CrR 8.3(b)." State v. Starrish, 544 P.2d 1 (1975), 12 CLB 361.

§ 65.98. Commutation

United States Supreme Court Two Tennessee defendants were convicted of murder in 1972. The jury assessed the death penalty. The Tennessee Court of Criminal Appeals affirmed the conviction, but in the light of the *Furman* decision abolishing the death penalty, reversed and remanded to the trial court on the issue of punishment. At this point, the range of punishment available for jury assessment was from twenty years to life imprisonment. Before such submission and

determination could be made, however, the Governor commuted the sentences to ninety-nine years each. The Tennessee appellate court upheld the validity of the commutations.

Defendants petitioned for federal habeas corpus relief, asserting, inter alia, that their Fourteenth and Sixth Amendments rights to jury trial were infringed by the commutations which were invalid because "there were no viable death sentences to commute," since they had already been vacated and the matter remanded to the trial court.

The United States Supreme Court held that no federal constitutional issues were here involved, and that the question of the validity of the governor's commutations and the extent of his authority were questions of Tennessee law which had been resolved by the Tennessee court. Rose v. Hodges, 96 S. Ct. 175 (1975), 12 CLB 192.

PUNISHMENT

§ 66.10. Cruel and unusual punishment

New Mexico *See* State v. Lunn, 537 P.2d 672 (1975), 12 CLB 83, CLD § 54.15.

§ 66.15. —Particular penalties as constituting cruel and unusual punishment

North Carolina Following the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972), abolishing the death penalty, the North Carolina General Assembly, acting on *its* interpretation of that decision, made the death penalty mandatory for first-degree murder and first-degree rape. The Supreme Court of North Carolina, in a felony-murder case, upheld the constitutionality of the death penalty. State v. Woodson, 215 S.E.2d 607 (1975), 12 CLB 82.

Arkansas *See* Collins v. State, 531 S.W.2d 13 (1976), 12 CLB 461, CLD § 65.65.

§ 66.90. Multiple punishment—merger doctrine

Court of Appeals, 8th Cir. Defendants were each convicted and sentenced on the separate counts of burglary, robbery, and larceny, which all arose from the same factual occurrence. On appeal, they contended that burglary and larceny were lesser offenses which merged in the more serious crime of robbery and that they should not have been convicted on each separate count.

Held, that burglary was a separate offense since it required proof of a fact – breaking and entering with intent to steal – not essential to the crime of robbery. Larceny, however, was a lesser-included offense of the crime of robbery, notwithstanding the government's contention that larceny, as distinct from robbery, requires proof of value.

The court also rejected the government's contention that the validity of the convictions need not be considered because the robbery and larceny sentences were made concurrent with the greater burglary sentence. United States v. Belt, 516 F.2d 873 (1975), 12 CLB 81.

§ 70.17. Multiple-offender sentences—enhancement

Louisiana Although it was disclosed during the course of defendant's trial that he had previously been convicted of a felony, it was not until two weeks after defendant had been convicted and *sentenced*, and had commenced serving his sentence, that the state filed a bill of information charging defendant as a second offender, subject to an enhanced penalty.

Held, that while undoubtedly the better practice is for a district attorney to file the multiple-offender bill *before* imposition of the sentence which is to be enhanced, the delay in the instant case was not so unreasonable as to violate Sixth Amendment speedy trial guarantees and did not result in prejudice to defendant.

State v. Bell, 324 So. 2d 451 (1975), 12 CLB 362.

F. POSTCONVICTION PROCEEDINGS

THE APPEAL

§ 71.30. Right to appeal

Missouri Defendant asserted, in a postconviction motion to vacate the judgment of conviction, that he was indigent and that he had a constitutional right to advice from his employed counsel, or from someone (i.e., the state, judge, or circuit attorney), to the effect that he had a constitutional right to court-appointed counsel and to a free transcript.

Held, in denying relief, that there was no showing in this case that defendant was indigent. It would be "obnoxious," said the court, to find a deprivation of constitutional rights where there was no showing that defendant was indigent or that the trial judge knew or had been informed of defendant's indigency, and where, after consultation with retained counsel, defendant filed with the court a written direction to his counsel not to appeal the case. Franklin v. State, 529 S.W.2d 954 (Mo. App. 1975), 12 CLB 357.

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 71.40. Right to counsel on appeal

Tennessee The Supreme Court of Tennessee felt bound by its prior interpretations of its relevant statute to hold that an indigent defendant was entitled to appointment of counsel to pursue an appeal by certiorari petition from a decision of the state's court of criminal appeals affirming a conviction.

The court noted that it was for the legislature to correct this "regrettable situation," which it deemed to be conducive to taxpayer-funded frivolous appeals, saying:

> "Lawyer assistance at this level should be state supported only when the lawyer who has appealed an indigent defendant's case to the Court of Criminal Appeals unsuccessfully, believes that there is sufficient merit in one or more assignments of error to justify a lawyer assisted certiorari petition, or upon a pro se certiorari petition, this Court finds that the issues are such that lawyer assistance in this Court will be meaningful."

State v. Williams, 529 S.W.2d 714 (1975), 12 CLB 201.

§ 71.55. Right to appeal on full record

Kentucky The public defender moved for leave to appeal the conviction of an indigent defendant in forma pauperis. The court considering the petition conducted a hearing to determine what portions of the record could be omitted without prejudice to the defendant. The court directed that the voir dire examination and the opening statements of counsel be omitted from the transcript. The public defender thereafter brought a proceeding for an order of mandamus requiring the furnishing of an entire transcript of the trial proceedings, including the material that had been ordered deleted.

Denying the petition for mandamus, the appellate court held that inasmuch as defendant had made no affirmative claim that any error had occurred during the voir dire or during the opening statements, their deletion from the transcript did not constitute deprivation of defendant's constitutional due process and equal protection rights. Goins v. Meade, 528 S.W.2d 680 (Ky. App. 1975), 12 CLB 217.

North Carolina Although the evidence and charge of the court had no bearing upon the appeal, defense counsel had them included in the record on appeal,

resulting in 114 pages and the unnecessary printing cost which had to be paid by the state because defendant was indigent. Said the court:

> "This type of irresponsible inclusion of unnecessary matter in the record on appeal is largely responsible for the provision in our new rules allowing such costs to be taxed personally against counsel."

State v. Jones, 219 S.E.2d 793 (1975), 12 CLB 358.

§ 71.65. Right to control scope of appeal

Georgia An indigent defendant's right to be represented by counsel on appeal does not include the right to insist that appointed counsel enumerate as error specified rulings of the trial court which counsel does not believe are meritorious.

Although the ABA Standards indicate that if counsel is unable to persuade the defendant that particular contentions are lacking in substance, it is "better for counsel" to present the matter, the failure of counsel to so proceed does not constitute ineffective assistance of counsel. Reid v. State, 219 S.E.2d 740 (1975), 12 CLB 357.

§ 71.70. Jurisdiction—in general

United States Supreme Court A Texas commercial exhibitor of the sex film *Deep Throat* was arrested for felonious use of his motion-picture projector under that state's "criminal instrument" statute.

The exhibitor obtained an order from a three-judge district court enjoining prosecution on the charge that the motion picture projector was a "criminal instrument" under the Texas penal provision. The district court found that the state's intention had been to harass but not go forward with a prosecution in which it could not expect to convict.

The state appealed directly to the Supreme Court under 28 U.S.C. § 1253, which grants the right of such direct appeal from an order "granting [an] . . . injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges."

The Supreme Court held that, notwithstanding the granting of the injunction by a three-judge district court, it was without jurisdiction to consider a direct appeal here. Its rationale was that since the district court had ruled that the actions of the Texas authorities "were not taken in the enforcement of the statute," no serious question about the constitutionality of the statute was presented. Consequently, a three-judge court was not required, and the appeal should have been taken to the Fifth Circuit Court of Appeals. Butler v. Dexter, 96 S. Ct. 1527 (1976), 12 CLB 607.

§ 71.75. —Appeal while out-of-state

Missouri A prisoner in an Oklahoma state penitentiary who had been convicted of a crime in Missouri and whose appeal had been denied, was not entitled to a hearing on his motion for postconviction relief so long as he was not in custody under the Missouri sentence but remained a prison inmate in another state. In so holding, the court rejected the defense contention that it should follow recent federal cases expanding the "in custody" requirement of federal habeas corpus. Wing v. State, 524 S.W.2d 443 (Mo. App. 1975), 12 CLB 100.

§ 73.20. Appellate review—plain error doctrine

Court of Appeals, 6th Cir. *See* United States v. Buffa, 527 F.2d 1164 (1975), 12 CLB 612, CLD § 59.18.

§ 73.30. —Harmless error test

Maryland During the course of an armed robbery trial, the defense recalled, as its own witness, a detective who was permitted, over the state's objection, to re-

late an exculpatory self-serving statement made by the defendant. On cross-examination, the prosecution asked the detective to estimate from his experience how often an arrested person had denied any involvement in the crime. The prosecutor then proceeded to ask: "And of the cases you investigated, can you give us any idea of the percentage in which convictions resulted from your arrest?"

Held, in reversing the conviction, that the collateral evidence concerning the detective's arrest-conviction record was irrelevant and extraneous to the issue of defendant's guilt or innocence, and that its admission was manifestly erroneous.

In considering next whether the error was "harmless," the court proceeded to reject the position that a different standard should be applied to errors of constitutional dimension as distinguished from other evidentiary or procedural errors. Rather, the court believed "that when [a defendant] in a criminal case establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated."

Applying this test to the instant case, the court, upon its own independent review of the entire record, was not persuaded beyond a reasonable doubt that the detective's testimony "did not contribute to the guilty verdict. . . . It was thus not 'harmless' error." Dorsey v. State, 350 A.2d 665 (1976), 12 CLB 481.

§ 73.40. —Harmless error test for constitutional errors

Court of Appeals, 2d Cir. *See* United States *ex rel.* Washington v. Vincent, 525 F.2d 262 (1975), 12 CLB 342, CLD § 45.00.

Maryland *See* Dorsey v. State, 350 A.2d 665 (1976), 12 CLB 481, CLD § 73.30.

§ 73.60. Bail pending appeal

California The California Supreme Court, in the exercise of its supervisory authority over state criminal procedures, has announced a new rule requiring a trial court issuing an order denying a motion for bail pending appeal to render a brief statement of reasons in support of that order. While such order need not include conventional findings of fact, it should set forth the basis of the order with sufficient specificity to permit meaningful review. *In re* Podesto, 544 P.2d 1297 (1976), 12 CLB 482.

OTHER POSTCONVICTION PROCEEDINGS
(including revocation of probation and parole)

§ 74.60. Motion to vacate conviction (state coram nobis, federal motions under 28 U.S.C. 2255, etc.)—in general

Court of Appeals, 7th Cir. *See* Faulisi v. Daggett, 527 F.2d 305 (1975), 12 CLB 613, CLD § 37.20.

§ 74.70. —Grounds

Missouri *See* McConnell v. State, 530 S.W.2d 43 (Mo. App. 1975), 12 CLB 359, CLD § 7.56.

§ 75.10. —Failure to raise claim at trial or on direct appeal at bar

New Mexico *See* State v. Mata, 543 P.2d 1189 (1975), 12 CLB 360, CLD § 7.15.

§ 75.35. Federal habeas corpus—grounds

Court of Appeals, 2d Cir. *See* United States *ex rel.* Washington v. Vincent, 525 F.2d 262 (1975), 12 CLB 342, CLD § 45.00.

Court of Appeals, 3d Cir. On the fifth day of defendant's nine-day trial for murder in a state court, defendant sought to withdraw his defense of temporary in-

sanity and to plead no contest to the indictment. The trial court rejected the plea offer. Two local newspapers which blanket the area carried news accounts of the plea attempt and its rejection by the trial court. Defense counsel promptly moved for a mistrial, citing adverse publicity.

Defendant sought and obtained a writ of habeas corpus in the federal district court on the ground that he had been deprived of his Sixth Amendment right to an impartial jury. The United States Supreme Court later handed down its decision in Murphy v. Florida, 95 S. Ct. 2031 (1975), in which it held that its previously established rule – that persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced – was inapplicable to federal habeas corpus review of state criminal proceedings.

The court of appeals reaffirmed issuance of the writ of habeas corpus. All that *Murphy* changed, said the court of appeals, was " 'the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged *alone presumptively* deprives the defendant of due process.' " It could not be said that the district court below had erred in finding the disseminated material prejudicial.

In light of the widespread dissemination of that prejudicial material, the appellate court went on, "at the very least, the state court should have conducted an immediate *voir dire* inquiry to determine if the jurors had read the offensive articles and, if they had, whether they could nonetheless render a fair and true verdict." United States *ex rel.* Greene v. New Jersey, 519 F.2d 1356 (1975), 12 CLB 77.

Court of Appeals, 4th Cir. *See* Edwards v. Garrison, 529 F.2d 1374 (1975), 12 CLB 612, CLD § 37.90.

Court of Appeals, 6th Cir. *See* Roddy v. Black, 516 F.2d 1380 (1975), 12 CLB 78, CLD § 37.42.

§ 75.36. —Jurisdiction

United States Supreme Court *See* Rose v. Hodges, 96 S. Ct. 175 (1975), 12 CLB 192, CLD § 65.98.

§ 75.40. —Requirement of custody

Court of Appeals, 8th Cir. Petitioner appealed the dismissal of his petition for a writ of habeas corpus, which was filed at least three years after he had completed serving his sentence and had been unconditionally released.

28 U.S.C. § 2241(c) provides that the writ of habeas corpus is only available to one who is in custody. The petitioner maintained, however, that "the disabilities which arise from a conviction constitute custody within the meaning of the federal habeas corpus statutes." He pointed out that he is unable to pursue certain professions under South Dakota law or to possess a firearm, and that he occupies the status of a recidivist if he commits another crime.

The Eighth Circuit Court of Appeals said that to hold that the petitioner was "in custody" because of his conviction, as he contended, "would render Congress' words meaningless." The "collateral consequences of conviction did not suffice to give the federal courts jurisdiction," said the court. The restraints on petitioner's liberty, noted the court, are "neither severe nor immediate. . . . He is not in custody within the meaning of the statute and the writ of habeas corpus is therefore not available." Harvey v. State, 526 F.2d 840 (1976), 12 CLB 458.

§ 75.45. —Exhaustion of state remedies

United States Supreme Court *See* Rose v. Hodges, 96 S. Ct. 175 (1976), 12 CLB 192, CLD § 65.98.

§ 75.48. —Waiver or deliberate bypass
"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

§ 75.52. —Procedure
Court of Appeals, 8th Cir. *See* United States v. Wangelin, 527 F.2d 579 (1975), 12 CLB 613, CLD § 90.00.

§ 75.65. State habeas corpus—grounds
Texas *See Ex parte* Evans, 530 S.W.2d 589 (Tex. Crim. App. 1975), 12 CLB 358, CLD § 81.35.

§ 75.70. —Scope of relief
Texas At the time of the act of consensual intercourse with a seventeen-year-old female, the age of consent was eighteen years. By the time of defendant's indictment for statutory rape, however, the age of consent had been lowered to 17 under the new penal code.

Granting habeas corpus relief, the court held that under the penal code's savings provision, the trial judge was required to dismiss the indictment as soon as it became evident that the conduct alleged was no longer an offense. Since no prosecution for statutory rape of a female seventeen years of age or older could now be maintained, the conviction must be set aside and defendant ordered released from custody. *Ex parte* Davila, 530 S.W. 2d 543 (Tex. Crim. App. 1975), 12 CLB 359.

§ 76.00. Probation—conditions
"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

§ 76.42. Parole—standards for determining eligibility
Court of Appeals, 2d Cir. An inmate of a New York state prison appealed the denial of his application for parole on the ground that the parole board had violated minimum standards of due process by its failure to notify him of the "release criteria" applied in determining whether or not to grant parole.

The Second Circuit held that while a policy of disclosure of release criteria was preferable, the failure of the parole board to make such disclosure did not violate the principles of fundamental due process where the inmate, as here, was provided with a statement of the specific facts and reasons for the denial of parole. Haymes v. Regan, No. 75-2096 (N.Y.L.J., Nov. 3, 1975), 12 CLB 101.

"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

PART III — MISCELLANEOUS

A. SPECIFIC CRIMES
(elements of crime, statutory construction, etc.)

STATE AND COMMON-LAW CRIMES

§ 80.02. Abortion
United States Supreme Court Defendant, a nonphysician, was convicted of attempting to procure an abortion in violation of a Connecticut statute making criminal an attempted abortion by "any person." The state's supreme court reversed the conviction on the ground that the United States Supreme Court holds in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973), and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739 (1973), compelled holding that the statute was null and void, and had to fall "as a unit."

The United States Supreme Court, granting the state's petition for certiorari, held that the Connecticut statute was not

unconstitutional as applied to nonphysicians, and that the Connecticut court misinterpreted *Roe* and *Doe*.

> "As far as this Court and the Federal Constitution are concerned, Connecticut's statute remains fully effective against performance of abortions by nonphysicians. We express no view, of course, as to whether the same is now true under Connecticut law."

Connecticut v. Menillo, 96 S. Ct. 170 (1975), 12 CLB 195.

§ 80.20. Bribery

New York A defendant in a criminal case asked a go-between to communicate his offer of a bribe to a material witness to induce the witness not to testify at trial. Although the go-between personally knew the witness, and led defendant to believe that she was in touch with the witness concerning the bribe offer, she never, in fact, communicated the offer. Defendant, subsequently convicted of the crime of bribing a witness, contended that the conviction should be set aside as a matter of law because the statute required "an agreement or understanding" between the parties. He argued that there was, at best, an inchoate and incompleted attempt at a crime which was not covered under the bribery statute.

The court held that the bribery statute did not require a meeting of the minds between the bribe giver and bribe receiver, and that the gist of the crime was the defendant's own effort or endeavor to confer the benefit. People v. LeGrand, 373 N.Y.S.2d 285 (Sup. Ct. 1975), 12 CLB 219.

§ 80.22. Burglary

Florida Defendants broke into a residence in the daytime, unarmed, and fled with a number of stolen objects, including a loaded pistol. They were charged with *armed* breaking and entering under a statute which provides that "whoever breaks and enters a dwelling house . . . with intent to commit a felony, . . . if he be armed with a dangerous weapon . . . at the time of breaking and entering, or *if he arm himself with a dangerous weapon*, . . . shall be guilty of a felony of the first degree." A motion to dismiss the information was sustained on the ground that the theft of a loaded pistol during the commission of a breaking and entering without any further showing of intent or willingness to use such weapon in furtherance of the breaking and entering did not constitute a violation of the above statute.

Reversing and remanding, the court held that a loaded pistol is a dangerous weapon, "and to take possession thereof is to arm oneself." Accordingly, the information properly charged the commission of a felony of the first degree. State v. Dopson, 323 So. 2d 644 (Fla. App. 1975), 12 CLB 362.

Illinois Evidence showing that defendant had gained entrance to a closed supermarket by paying a sum of money to the store's night clerk, who permitted him to come in and remove goods of a greater value, was sufficient to prove unauthorized entry for the purpose of convicting for burglary.

> "[T]he general authority to enter a building open to the public extends only to those who enter for a purpose consistent with the reason the building is open. An entry with intent to commit a theft is not within the authority granted to patrons of a supermarket."

People v. Harris, 338 N.E.2d 129 (Ill. App. 1975), 12 CLB 219.

§ 80.22.5. Child abuse

Maryland Defendant left her three-and-a-half-year-old daughter in the custody of a couple with whom she resided. When she saw her daughter again, two days later, it was evident from the child's many bruises and listlessness that she had been

badly beaten. Although the child's condition steadily worsened into coma, the twenty-year-old mother did not take the child to the hospital because she "was too ashamed of the bruises" on her daughter's body. It was not until about nine hours later that the child was taken to the hospital, where she was pronounced dead of peritonitis.

Defendant was charged with violation of a Maryland statute providing that any parent or other person having custody of a child under eighteen years of age "who *causes* abuse to such minor child" shall be guilty of a felony. The statute, it is important to note, defines the term "abuse" to mean "any physical injury or injuries sustained by a child *as a result of cruel or inhumane treatment* or as a result of malicious act or acts."

Defendant contended that to be guilty of child abuse under the statute, a person must have "caused" the child to suffer physical injury as a result of cruel or inhumane treatment; and that since her daughter was injured and died as a consequence of blows inflicted by someone other than herself, her failure to obtain medical aid for her child was not the cause of the child's injuries or death. Thus, defendant maintained, the gist of the statutory offense of child abuse is not cruel or inhumane treatment but, rather, the infliction of physical injuries upon a child as a result of such treatment.

Rejecting defendant's argument, the Maryland Court of Appeals held:

> "In making it an offense for a person having custody of a minor child to 'cause' the child to suffer a 'physical injury,' the Legislature did not require that the injury result from a physical assault upon the child or from any physical force initially applied by the accused individual; it provided instead, in a more encompassing manner, that the offense was committed if physical injury to the child resulted either from a course of conduct constituting 'cruel or inhumane treatment' or by 'malicious act or acts.'"

In the instant case, the court went on, there was sufficient evidence for the jury to conclude

> "[T]hat [defendant's] failure to act caused [her child] to sustain bodily injury additional to and beyond that inflicted upon her by reason of the original assault and constituted a cause of the further progression and worsening of the injuries which led to [the child's] death; and that in these circumstances [defendant's] treatment of [her child] was 'cruel or inhumane' within the meaning of the statute and as those terms are commonly understood."

State v. Fabritz, 348 A.2d 275 (1975), 12 CLB 363.

§ 80.24.5. Curfew laws

Illinois *See* People v. Chambers, 335 N.E.2d 612 (Ill. App. 1975), 12 CLB 216, CLD § 56.40.

§ 80.28.1. Escape from custody

Texas *See* Branson v. State, 525 S.W.2d 187 (Tex. Crim. App. 1975), 12 CLB 98, CLD § 55.92.

§ 80.33. Felony theft

Texas *See Ex parte* Evans, 530 S.W.2d 589 (Tex. Crim. App. 1975), 12 CLB 358, CLD § 81.35.

§ 80.40. Forgery

Massachusetts Defendant was the president and treasurer of a construction firm which had been engaged to make extensive repairs on a church. At a certain point, defendant falsely induced the pastor to sign several checks, totaling thousands of dollars, by representing them to be "permission slips" authorizing defen-

dant to cash an earlier check at the church's bank.

Held, in sustaining the conviction, that "by falsely inducing [the pastor] to put his signature on an instrument for a purpose he did not intend, the defendant committed forgery." Commonwealth v. Zaleski, 336 N.E.2d 877 (Mass. App. 1975), 12 CLB 220.

§ 80.44. Fraud

"Self-Incrimination in White-Collar Fraud Investigations: A Practical Approach for Lawyers" by Edward Brodsky, 12 CLB 125 (1976).

§ 80.45. Harassment

New York The trial court could not, after granting defendant's motion to dismiss the charges of resisting arrest and disorderly conduct, add a count of harassment on its own initiative. Harassment, the appellate court held, "could not be considered a lesser included offense of resisting arrest because the former requires proof of an element – an intent to harass, annoy or alarm – which is not required to establish the crime of resisting arrest." Harassment could not, moreover, be considered a lesser-included offense of disorderly conduct because both were of the same grade or degree. Hence, the harassment count could only be added upon application of the state, with notice to defendant prior to the commencement of trial.

Reversing the conviction, the court held that there was no need for defendant to have specifically objected to the trial court's ruling since "a party who has without success requested a particular ruling is deemed to have thereby protested the court's ultimate disposition." People v. Davis, 370 N.Y.S.2d 328 (N.Y. App. 1975), 12 CLB 88.

§ 80.75. Larceny

Alaska An Alaska statute provided that a person who found lost property and appropriated it to his own use or that of another, without either advertising his discovery in a newspaper or notifying a police officer, was guilty of larceny. The Alaska Supreme Court held that the statute was constitutionally defective and violated due process because it failed to make an express requirement of criminal intent. State v. Campbell, 536 P.2d 105 (1975), 12 CLB 83.

§ 80.90. Manslaughter

"A Legislative Proposal for a Legal Right to Die" by Walter W. Steele, Jr. and Bill Hill, 12 CLB 140 (1976).

§ 80.95. Murder

"A Legislative Proposal for a Legal Right to Die" by Walter W. Steele, Jr. and Bill Hill, 12 CLB 140 (1976).

§ 81.10. Obscenity

United States Supreme Court In a civil equity proceeding instituted by an Alabama district attorney's office to which this defendant was not a party, a state judge held that four specified magazines named in the action were "judicially declared to be obscene." Shortly thereafter, state officials delivered to defendant, a bookstore operator, a letter from the state attorney general informing him of the names of the magazines which had been declared to be obscene. Defendant, who continued to sell one of these magazines, was subsequently arrested and charged with the crime of selling "mailable matter known . . . to have been judicially found to be obscene."

The Court held that the Alabama procedures failed to adequately protect defendant's First Amendment rights. Defendant, it was noted, had received no prior notice of the equity proceeding and had thus been deprived of any opportunity to be heard regarding the adjudication of obscenity *vel non* by which the Alabama court had held him to be bound. Moreover, there did not appear to be any

judicial avenue for his challenging of that obscenity ruling. This was tantamount, from defendant's point of view, to a unilateral form of censorship, despite the state's assertion of the "judicial" and "adversary" nature of the equity proceeding. Such a proceeding, said the Court, "without any provision for subsequent re-examination of determination of the censor, would clearly be constitutionally infirm." McKinney v. Alabama, 96 S. Ct. 1189 (1976), 12 CLB 605.

Court of Appeals, D.C. Cir. Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973), which redefined the standards for determining obscenity, was decided subsequent to defendants' indictment, but prior to trial in the District of Columbia, on charges of distribution and exhibition of an obscene film. The district court instructed the jury in accordance with the test elaborated in *Miller*.

Held, in reversing defendants' convictions, that the retroactive application of the *Miller* obscenity test was violative of defendants' due process rights. Said the court in this connection:

> "It is clear that [the] *Miller* test is an expansion of the area of activity which can potentially result in criminal liability. . . . It is a fundamental principle that a person must have actual notice of what activity is prohibited before he may be held criminally liable for his actions."

Upon retrial, however, the jury must be instructed under *Miller* as to those elements of the offense for which *Miller* would be "beneficial" to defendants' case. United States v. Sherpix, Inc., 512 F.2d 1361 (1975), 12 CLB 79.

Minnesota City police officers, after viewing the commercial showing of an allegedly obscene film, obtained a search warrant and seized defendant exhibitor's only copy of the film. At the time that the police executed the warrant, they notified defendant in writing that the film was being seized solely for use as evidence, that the city would appear at an adversary hearing at any reasonable time, and that the city would allow defendant to copy the film so that defendant could continue to show it during the pendency of the action. Later, defendant was arrested and charged with exhibiting an obscene film.

Defendant did not follow the procedures suggested by the police but, instead, promptly moved for an order returning the film and suppressing its use in evidence. The court granted an order directing the return of the film intact and enjoining the city from seizing it again until a prior adversary hearing be held. The city appealed.

The Supreme Court of Minnesota affirmed, holding that the case was controlled by Johnson v. City of Rochester, 293 Minn. 156, 197 N.W.2d 244 (1972), which held that "a warrant to seize the *only copy* of an allegedly obscene movie may not issue consistent with the First Amendment of the United States Constitution without a prior adversary hearing." City of Duluth v. Wendling, 237 N.W.2d 79 (1975), 12 CLB 365.

Oklahoma Defendant, who had performed an erotic dance, was convicted of the offense of "outraging public decency." On appeal, she contended that the trial court had erred in refusing to instruct the jury in accordance with the requisites for determination of obscenity set forth in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1975).

Reversing the conviction, the appellate court rejected the prosecution's contention that the offense charged was not based on obscenity, but rather on prohibited "conduct" and was, therefore, outside the context of *Miller*. Said the court:

> "This contention is void of any logical reasoning. The . . . case law squarely places the act complained of as one

which falls within the form of conduct which fits within the category of offenses which must be tried on basis of obscenity standards."

Dominguez v. City of Tulsa, 539 P.2d 758 (Okla. Crim. App. 1975), 12 CLB 97.

Oklahoma *See* Hess v. State, 536 P.2d 366 (Okla. Crim. App. 1975), 12 CLB 97, CLD § 9.10.

§ 81.25. Possession and sale of drugs

Court of Appeals, 7th Cir. In a matter of first impression for any federal court, the Seventh Circuit rejected the "usable quantity" doctrine adopted by some states with respect to possession of narcotics cases.

Under that doctrine, the prosecution could not obtain a conviction, especially where minute amounts of contraband were involved, unless it proved that the quantity of narcotics possessed "represented a quantity capable of use or abuse (i.e., that it was capable of producing the proscribed physiological effect)."

The court reiterated its adherence to the "measurable amount" standard contained in the following instruction (Devitt & Blackmar, *Federal Jury Practice and Instructions* § 44.12 (1970)):

> "The evidence in this case need not establish that the amount or quantity of heroin was as alleged in the indictment, but only that some *measurable* amount of a heroin drug was in fact the subject of the acts charged in the indictment. . . ."

United States v. Jeffers, 524 F.2d 253 (1975), 12 CLB 195.

District of Columbia *See* James v. United States, 350 A.2d 748 (D.C. App. 1976), 12 CLB 621, CLD § 56.39.

Nebraska Defendant was convicted of "delivery of a controlled substance." On appeal, he contended that the evidence failed to show a delivery because defendant did not actually physically transfer the substance to the purchaser, an undercover agent, but merely directed him to its exact location. The relevant section defines delivery as "actual or constructive transfer."

Held, in affirming the conviction, that the instant transaction constituted constructive transfer under the statute. State v. Guyott, 239 N.W.2d 781 (1976), 12 CLB 624.

"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

§ 81.32. Rape

Florida *See* Farley v. State, 324 So. 2d 662 (Fla. App. 1976), 12 CLB 478, CLD § 50.20.

Texas *See Ex parte* Davila, 530 S.W.2d 543 (Tex. Crim. App. 1975), 12 CLB 359, CLD § 75.70.

"Abolishing Cautionary Instructions in Sex Offense Cases: People v. Rincon-Pineda" by Robert L. Eisenberg, 12 CLB 58 (1976).

§ 81.35. Robbery

Texas Under a long-standing Texas rule, an indictment for robbery is fundamentally defective and cannot support a conviction if it fails to allege the ownership of the property taken in the robbery, even though it sufficiently alleges that the property was taken from the possession of the victim. Judgment reversed and prosecution ordered dismissed. "This part of the unwritten law of the West is or should be past history. One can be so convicted when the person in possession of the property has a greater right to possession than the owner." Pittman v. State, 532 S.W.2d 97 (Tex. Crim. App. 1976), 12 CLB 474.

Illinois Defendant snatched from complainant's hands a number of complainant's phonograph records while they were attending a dance. A tug-of-war ensued

over the records, with the defendant finally gaining control of them. At this point, defendant told the complainant that if he wanted them back he would have to come with him across the street, whereupon he pulled the complainant out of the building into the street, then, producing a gun, he forced him to cross the street and hit him over the head with the revolver.

Defendant was charged with armed robbery and aggravated battery, among other offenses.

Held, in reversing the armed robbery conviction, that the robbery must be deemed to have been completed before the weapon was brought into play. People v. Simmons, 342 N.E.2d 322 (Ill. App. 1975), 12 CLB 623.

North Carolina *See* State v. Bozeman, 221 S.E.2d 91 (N.C. App. 1976), 12 CLB 474, CLD § 46.97.

Texas Defendant pretended to seek the aid of the victim, then drew a pistol, took the victim's wallet, shot him in the stomach, forced him to run away, and then stole his car.

The prosecutor "carved" two offenses: robbery by assault (the wallet) and felony theft (the automobile). Defendant was tried and convicted on the robbery charge first, and that conviction was affirmed. On a later date, he entered a guilty plea to the felony theft offense and was assessed a ten-year sentence.

Subsequently, defendant filed an application for writ of habeas corpus. Voiding the judgment and sentence for felony theft, the court held that since the only distinction between robbery and theft is actual or threatened "antecedent violence," and since the antecedent violence in the instant case was so closely intertwined with the theft of the victim's money, billfold, *and vehicle*, it was "obvious that the State could have, had it desired, also included in the robbery indictment . . . the allegation that the petitioner appropriated the victim's vehicle. The fact that the State did not seek to allege all the items stolen from the victim within the robbery indictment cannot be a justification for allowing multiple prosecutions. The prosecution for theft should have been barred by the 'carving' doctrine." *Ex parte* Evans, 530 S.W.2d 589 (Tex. Crim. App. 1975), 12 CLB 358.

§ 81.41. Sex crimes

United States Supreme Court *See* Rose v. Locke, 96 S. Ct. 243 (1976), 12 CLB 193, CLD § 56.45.

Arizona *See* State v. Callaway, 542 P.2d 1147 (Ariz. App. 1975), 12 CLB 215, CLD § 81.45.

§ 81.45. Sodomy

Arizona Defendant was charged with forcibly committing sodomy and a lewd and lascivious act upon a person who was not his wife. He denied that the alleged victim had not consented and asserted that the penal statutes involved were facially void as violative of the constitutionally protected right of privacy.

The Court of Appeals of Arizona, agreeing with defendant, held that the statutes proscribing sodomy and lewd and lascivious acts were unconstitutional.

At the outset, the court held that defendant had standing to assert the right of sexual privacy possessed by consenting adults, notwithstanding the state's evidence that the acts had been forced upon the victim. In so holding, the court was mindful of the predicament truly consenting couples would be placing themselves in by coming forward to assert their rights.

The court went on to hold that the right to privacy did not inhere in the marriage relationship alone. The Arizona court interpreted Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972), as making it "clear that the right of privacy is a

right of all persons, whether married or not."

The court also noted that an alternative ground for its decision was that since the statutes in question could not be enforced against married persons, to enforce them against consenting unmarried persons would be violative of equal protection of the laws. State v. Callaway, 542 P.2d 1147 (Ariz. App. 1975), 12 CLB 215.

§ 81.70. Vagrancy

"Street Patrol: The Decision to Stop a Citizen" by Robert L. Bogomolny, 12 CLB 544 (1976).

FEDERAL CRIMES

§ 82.66. Burglary (18 U.S.C. 1153)

Court of Appeals, 8th Cir. *See* United States v. Belt, 516 F.2d 873 (1975), 12 CLB 81, CLD § 66.90.

§ 82.70. Drug violations

United States Supreme Court The Controlled Substances Act (21 U.S.C. § 801 et seq.) contains three penalty provisions (§§ 841, 842, 843) dealing with unlawful distribution or dispensation of controlled substances. Defendant, a licensed physician registered under the Act, was prosecuted and convicted under Section 841 of "knowing and unlawful distribution and dispensation of methadone." He contended on appeal that Section 841, with its more drastic penalties of imprisonment and fine, was reserved, he asserted, for persons outside the legitimate distribution chain.

The Court held that registered physicians can be prosecuted under Section 841 when "their activities fall outside the usual course of professional practice." The Act, said the Court, not only defines the term "practitioner" and limits registration to the dispensing and use of drugs "in the course of professional practice or research," but it also reflects the intent of Congress to confine "authorized medical practice within accepted limits."

The evidence presented at the trial was sufficient for the jury to find that defendant's conduct exceeded the bounds of "professional practice." United States v. Moore, 96 S. Ct. 335 (1975), 12 CLB 335.

Court of Appeals, 2d Cir. The fact that an indictment under 21 U.S.C. § 846 for conspiracy to distribute cocaine did not allege any overt act as part of the conspiracy did not render the indictment insufficient. Under the common law, the "substantive" crime of conspiracy does not require commission of an overt act.

Unlike 18 U.S.C. § 371 (the general conspiracy statute), 21 U.S.C. § 846 was placed on a "common law footing" and does not specifically require that "one or more of [the conspirators] do any act to effect the object of the conspiracy." United States v. Bermudez, 526 F.2d 89 (1975), 12 CLB 341.

§ 83.07. Federal Escape Act (18 U.S.C. 751(a))

Court of Appeals, 8th Cir. A federal prisoner who escaped from a county jail to which he had been temporarily transferred for the purpose of giving testimony in a state postconviction proceeding he had initiated, was, in effect, in federal custody for the purpose of prosecution for escaping from the custody of the attorney general or his representative under 18 U.S.C. § 751. United States v. Stead, 528 F.2d 257 ([Mo.] 1975), 12 CLB 614.

§ 83.08.5. Firearms violations (18 U.S.C. 1715)

United States Supreme Court Defendant, who mailed a 22-inch sawed-off shotgun to another, was convicted under 18 U.S.C. § 1715, which prohibits the mailing of firearms "capable of being concealed on the person."

The Ninth Circuit reversed the conviction, holding that, although it was clear that a pistol could be concealed on the

person, "the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence."

The Supreme Court first considered, and rejected, defendant's alternative statutory argument that the provision simply did not extend to sawed-off shotguns. "To narrow the meaning of the language Congress used so as to limit it to only those weapons which could be concealed as readily as pistols or revolvers would not comport" with the legislative intent, said the Court.

Turning to the constitutional claim of vagueness, the Court held that the court of appeals had "seriously" misconceived the "void for vagueness" doctrine, and that the fact Congress might have chosen "clearer and more precise language" did not mean the statute which it in fact drafted was unconstitutionally vague. The Court held that the statute "intelligibly forbids a definite course of conduct: the mailing of concealable firearms"; and that it gave the defendant in the instant case "adequate warning" that her mailing of the sawed-off shotgun was a criminal offense. United States v. Powell, 96 S. Ct. 316 (1975), 12 CLB 336.

§ 83.09. Fraud

"Self-Incrimination in White-Collar Investigations: A Practical Approach for Lawyers" by Edward Brodsky, 12 CLB 125 (1976).

§ 83.09.5. Gun Control Act of 1968 (18 U.S.C. 922(h))

United States Supreme Court Section 922(h) of the Gun Control Act of 1968 makes it unlawful for certain persons, including convicted felons, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Defendant in the instant case, a convicted felon, bought a revolver in an over-the-counter retail sale from a licensed dealer in his hometown in Kentucky. The gun had been manufactured in Massachusetts and shipped to a dealer who, in turn, had shipped it to the retail store in Kentucky. Less than an hour after his purchase, defendant was arrested within the state for driving while intoxicated – and the gun was found fully loaded on the floorboard of his car. At the trial, no evidence was presented to show that defendant had personally participated in any interstate movement of the revolver either before or after its purchase.

The Supreme Court held that Section 922(h) applied to a convicted felon's intrastate purchase from a retail dealer of a firearm that previously, but independently of the felon's receipt, had been transported in interstate commerce from the manufacturer to a distributor and then from the distributor to the dealer. Barrett v. United States, 96 S. Ct. 498 (1976), 12 CLB 336.

§ 83.18. Interstate fraud

Court of Appeals, 10th Cir. One Crim, under the name of "Cole," which he sometimes used, joined a "Committee of Concerned Citizens." The Committee opened a bank account empowering "Cole" and another to draw checks. "Cole" drew checks payable to Crim.

Indicted for issuing checks in violation of 18 U.S.C. § 2314, proscribing fraudulent interstate transfers, Crim asserted, among other things, the absence of any "falsely made" or "forged security." This followed, he claimed, from his legal right to use another name. Since the two checks were drawn on his "own name," there could be no forgery.

Held, in affirming his ensuing conviction, that defendant could not "have two 'real' names during any one given period of time." United States v. Crim, 527 F.2d 289 ([Kan.] 1975), 12 CLB 615.

§ 83.37. Larceny (18 U.S.C. 661)

Court of Appeals, 8th Cir. *See* United

States v. Belt, 516 F.2d 873 (1975), 12 CLB 81, CLD § 66.90.

§ 83.53. NARA (Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. 4251, 4253)

"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

§ 83.55. National Firearms Act

Court of Appeals, 6th Cir. Defendant, who was attempting to board a commercial airliner while carrying a "ground burst projectile simulator," was charged with knowing possession of an unregistered firearm, in violation of 26 U.S.C. § 5861(d).

Held, in reversing the conviction, that although the simulator had an explosive or incendiary charge sufficient to otherwise bring it within the statutory definition of a "destructive device," and although such a device, if detonated, would probably take off most of the hand of a person holding it, the device was specifically excluded by the language "any device which is neither designed nor redesigned for use as a weapon." United States v. Dalpiaz, 527 F.2d 584 ([Ky.] 1975), 12 CLB 614.

§ 83.58. Perjury (18 U.S.C. 1623)

Court of Appeals, D.C. Cir. The conviction of a witness for perjury on the basis of testimony before the Senate Judiciary Committee was reversed where the government could not prove that a duly constituted quorum of that Committee had been present. To obtain a perjury conviction, the government must prove not only that defendant, while under oath, willfully made a false statement concerning a material matter, "but also that the tribunal to which the statement was made was 'competent.'"

While the Committee was authorized to adopt, and did adopt, a rule setting one member as a quorum for the purpose of taking sworn testimony, this rule could not be considered valid where it had never been published in the *Congressional Record*, as required by 2 U.S.C. § 190a-2 (1970). This, in turn, required the court to hold that at the time of defendant's testimony, a quorum of the Committee for the purpose of taking sworn testimony was more than one senator. United States v. Reinecke, 524 F.2d 435 (1975), 12 CLB 198.

§ 83.75. Robbery (18 U.S.C. 2111)

Court of Appeals, 8th Cir. *See* United States v. Belt, 516 F.2d 873 (1975), 12 CLB 81, CLD § 66.90.

B. ANCILLARY, QUASI-CRIMINAL, AND OTHER RELATED PROCEEDINGS

CONTEMPT

§ 85.10. Contempt—grounds

Delaware Several schoolteachers were charged with offenses arising from their participation in a teacher's strike. As a condition of their release pending trial, a municipal court imposed a curfew restriction upon them, prohibiting them from leaving their homes during working hours except to go to their regular employment. They ignored the curfew condition and petitioned for a writ of habeas corpus. The court ordered the condition "vacated as void because the judge abused his discretion."

Charged with criminal contempt for willful violation of the condition prior to the granting of the writ of habeas corpus, the teachers petitioned for a writ of prohibition, arguing that because the bail condition was ultimately held to be "void," it was void ab initio, and disobedience of it, therefore, could not be sanctioned by way of criminal contempt charges.

Denying the petition for a writ of prohibition, the court held that the case came within the ambit of the general rule that

a party may not prevail where he has disregarded a court order unless it be shown that the order was void for lack of jurisdiction.

While the court's use of the word "void" was perhaps unfortunate, it was not significant, and the court had jurisdiction to make such an order. The condition was declared invalid not because the court lacked jurisdiction to enter it, but because the court "abused its discretion in carrying out its jurisdiction." Rambo v. Fraczkowski, 350 A.2d 774 (Del. Super. 1975), 12 CLB 482.

§ 85.20. —Formal requirements

Court of Appeals, 8th Cir. *See In re* Long Visitor, 523 F.2d 443 (1975), 12 CLB 198, CLD § 23.85.

DEPRIVATION OF CIVIL RIGHTS

§ 85.80. Deprivation of civil rights—in general

United States Supreme Court Plaintiffs commenced two civil rights class actions under 42 U.S.C. § 1983 against the Mayor of Philadelphia, the Police Commissioner, and others, alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens in particular and Philadelphia residents in general, and seeking certain equitable relief. The District Court for the Eastern District of Philadelphia found, inter alia, that the evidence did not establish the existence of any official *policy* to deprive minority citizens of their constitutional rights, and that only a small percentage of the police force committed violations of legal and constitutional rights. However, the court also found evidence of departmental discouragement of complaints, a tendency to minimize the consequences of police misconduct, and that the frequency with which the violations occurred was such that they could not be dismissed as "rare, isolated instances." Accordingly, the court directed the defendants to draft, for the court's approval, "a comprehensive program for dealing adequately with civilian complaints," to be formulated in accordance with detailed "guidelines" suggested by the court for revising police manuals and procedural departmental rules.

The United States Supreme Court reversed (Mr. Justice Blackmun, with whom Mr. Justice Brennan and Mr. Justice Marshall joined, dissenting).

The Court (per Mr. Justice Rhenquist) agreed with defendants' claims that the "judgment of the District Court represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions."

Initially, the Court held that the "requisite Art. III case or controversy between the individually named respondents and petitioners was lacking." Noting that the small (twenty) number of incidents of constitutional dimension had involved a small percentage of police officers – none of whom, the Court pointed out, had been *named as parties* to these actions – the Court concluded that plaintiffs' claim to "real and immediate" injury did not rest upon what the named defendants might do to them in the future, but upon what one of a small, unnamed minority of policemen might do, and that plaintiffs thus lacked the requisite "personal stake in the outcome," i.e., the order overhauling police disciplinary procedure.

Moreover, held the Supreme Court, the district court's "unprecedented theory of § 1983 liability" was erroneous because it held that a class action for equitable relief had been made out on a showing of an "unacceptably high" number of incidents of constitutional dimension, when, in fact, only some twenty incidents had occurred "in a city of three million inhabitants, with 7,500 policemen." Such an "open-ended construction of § 1983" was not supported by any case, said the Court.

Finally, the Court addressed – and re-

jected – the "novel" claim that given the citizenry's "right" to be protected from unconstitutional exercises of police power, and given the need for such protection, plaintiffs had a right to mandatory equitable relief, and the proposition that the scope of federal equity power should be extended to fashioning "prophylatic" procedures for a state agency designed to minimize this kind of misconduct. "Important principles of federalism" militated against this proposition, said the Court:

> "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"

The Court, said the dissent, should not have substituted its judgment for that of the district court. "Small as the ratio of incidents to arrests may be, the District Court nevertheless found a pattern of operation, even if no policy, and one sufficiently significant that the violations 'cannot be dismissed as rare, isolated instances.'"

The dissent regarded what was accomplished by the district court "as one of those rightly rare but nevertheless justified instances . . . of federal court 'intervention' in a state or municipal executive area." Rizzo v. Goode, 96 S. Ct. 598 (1976), 12 CLB 331.

Court of Appeals, 7th Cir. A pregnant woman allegedly sustained a miscarriage as the result of being roughed up by Chicago police officers when they attempted to make an illegal search of her person. The incident resulted in her being taken into custody for resisting arrest and held for several hours. Apparently fearful that she would be unable to pay the fine which might be imposed if convicted, she agreed to sign a release of all her claims against the city and the officers in exchange for a dismissal of the charges against her.

Subsequently, however, she commenced the instant proceeding under the Civil Rights Act (42 U.S.C. §§ 1983, 1985, 1986, 1988) for damages and other relief against the two officers and others.

Held, in reversing the dismissal of the complaint, that the circumstances under which the woman signed the release were inherently coercive regardless of who had initiated the exchange. Moreover, warned the court, such agreements tended to suppress complaints against police misconduct and to tempt a prosecutor "to trump up charges for use in bargaining for suppression of the complaint." The release, said the court, must be construed as void, not only because of "the inherent coercion present," but also because it was against public policy. Boyd v. Adams, 513 F.2d 83 (1975), 12 CLB 79.

JUVENILE PROCEEDINGS

§ 89.00. Right to be treated as a juvenile

Alabama *See* Raines v. State, 317 So. 2d 559 (1975), 12 CLB 85, CLD § 91.00.

"Three Models of Juvenile Justice" by Daniel Katkin, John Kramer, and Drew Hyman, 12 CLB 165 (1976).

§ 89.03. Use of juvenile's records

Michigan *See* People v. Crutchfield, 233 N.W.2d 507 (Mich. App. 1975), 12 CLB 212, CLD § 52.30.

§ 89.10. Juvenile proceedings—right to counsel

Georgia A fifteen-year-old girl who had previously been adjudged an "unruly child" and placed on probation was, on the complaint of her mother, subsequently adjudicated a "delinquent child" at a probation revocation hearing. Prior to the commencement of this latter proceeding, both mother and daughter signed a form waiving right to counsel.

Reversing the delinquency determination, the court held that the mother could not effectively waive her daughter's right to counsel since, as the complaining party,

her interests must be deemed to be adverse to those of the child. The court held that the waiver of counsel signed by the child was likewise ineffective. By state law, the court observed, counsel must be provided whenever a child is not represented by a parent. Here again, "there was no competent representation of this girl by her mother, and the young girl's waiver was therefore ineffective." K.E.S. v. State, 216 S.E.2d 670 (Ga. App. 1975), 12 CLB 85.

§ 89.25. —Right to due process

"Three Models of Juvenile Justice" by Daniel Katkin, John Kramer, and Drew Hyman, 12 CLB 165 (1976).

§ 89.40. —Standards for determining admissibility of confession or admission

Pennsylvania Failure to give a fifteen-year-old murder suspect "the benefit of parental or interested-adult guidance" prior to his giving his confession mandated suppression of the confession, in accordance with prior holdings, notwithstanding that he had been accorded *Miranda* warnings, that he had not asked to have his parent present, and that he had had prior experience with the police. Commonwealth v. McCutchen, 343 A.2d 669 (1975), 12 CLB 84.

Pennsylvania In a case involving the admissibility of an oral confession to the police by a fifteen-year-old murder suspect, it was held that the juvenile's waiver of *Miranda* rights was involuntary where the police did not accord him "the benefit of counsel or parental or informed interested-adult guidance" prior to obtaining the confession. Commonwealth v. Riggs, 348 A.2d 429 (1975), 12 CLB 360.

§ 89.65. Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5037) —waiver of jury trial

Court of Appeals, 10th Cir. Defendant, aged 17, was tried as a juvenile in a federal court, and was found guilty of involuntary manslaughter and adjudged to be a juvenile delinquent under the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5037). On appeal, he invoked *In re* Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967), in which the Supreme Court had expressly established the requirement that notice be given to both the juvenile and his parents.

Held, in sustaining the determination of juvenile delinquency, that notwithstanding *Gault's* express requirement that notice be given to a juvenile's parents, due process had not been violated under the circumstances of the instant case. The parents here had, in fact, been aware of the charges and had actively assisted the youth at trial. Moreover, he had been represented by adequate counsel. United States v. Watts, 513 F.2d 5 (1975), 12 CLB 80.

COMMITMENT PROCEEDINGS

§ 89.75. Narcotics addicts

"Representing the Addict Defendant" by James C. Weissman, 12 CLB 389 (1976).

MANDAMUS

§ 90.00. Mandamus—in general

Court of Appeals, 8th Cir. A state prisoner petitioned for a federal writ of habeas corpus on the ground that the failure of count-appointed trial counsel to conduct a pretrial investigation into the murder case constituted ineffective assistance of counsel. The district court denied the motion, but the court of appeals reversed and remanded for an evidentiary hearing to determine whether the petitioner had in fact been prejudiced by the failure of his trial counsel to make a reasonable investigation of the case. Although an evidentiary hearing was subsequently held, the district court remanded the case to the Missouri Supreme Court

without determining the question of prejudice. Instead, the order of remand referred that question back to the state court.

Defendant petitioned for a writ of mandamus, contending, among other things, that the district court's order remanding the case without a final determination was inconsistent with the court of appeals' prior mandate.

Denying the writ of mandamus, the court held that the action taken by the district court was not inconsistent with the appellate court's prior mandate since it was "acceptable practice for the District Court to send a case back to the state courts to resolve issues more properly considered by the judge who experienced the trial first hand." United States v. Wangelin, 527 F.2d 579 ([Mo.] 1975), 12 CLB 613.

SUITS BY PRISONERS UNDER FEDERAL CIVIL RIGHTS ACT, ETC.

§ 90.55. In general

Court of Appeals, 4th Cir. State prisoners claiming deprivations of civil rights in prison treatment, were not required to exhaust available state administrative or judicial remedies before a federal district court could exercise jurisdiction in a suit brought under 42 U.S.C. § 1983. It was not, moreover, necessary for plaintiffs to show that the state did not provide an effective administrative remedy for their claims. McCray v. Burrell, 516 F.2d 357 (1975), 12 CLB 80.

§ 90.98. Transfer of prisoners—due process

Court of Appeals, 5th Cir. Prisoners who were convicted in the Virgin Islands and who were transferred to mainland federal prisons and treated as maximum security risks contended, inter alia, that they were summarily transferred without any of the rudiments of due process, such as notice, a statement of reasons, and an impartial hearing, as mandated by the due process clause of the Fifth and Fourteenth Amendments.

Held, the prisoners "were not entitled to notice, a hearing, or other elements of procedural due process," where their transfer was not based on their "institutional behavior" and, thus, was not "disciplinary" in nature, but was, rather, a *nondisciplinary, administrative* transfer.

An "administrative" transfer, explained the court, "is based solely on proper administrative and correctional criteria, and *not* on an inmate's institutional behavior." A nondisciplinary transfer, on the other hand, "is closely akin to the initial determination of the place and specific facility for confinement which, in the federal system, is almost wholly confided in the Attorney General."

Finally, the court noted that there was "ample protection in the rule committing these decisions to administrative discretion, since the abuse of discretion standard is not a meaningless phrase. . . . Although the door is narrow and the way hard, governmental action which is in fact arbitrary or capricious is open to limited, but ample, judicial scrutiny." United States *ex rel.* Gereau v. Henderson, 526 F.2d 889 ([Ga.] 1976), 12 CLB 461.

YOUTHFUL OFFENDER PROCEEDINGS

§ 91.00. In general

Alabama Alabama's Youthful Offender Act requires that an otherwise eligible person who wishes to secure youthful-offender status must waive a jury trial and consent to be tried by a court. Defendant refused to sign such a waiver. He challenged the constitutionality of the provision, asserting that where an accused must waive a jury trial in order to be eligible for certain benefits, such requirement

penalizes the assertion of a constitutional right and is a denial of due process.

The Supreme Court of Alabama held that a juvenile proceeding was not criminal in nature and, therefore, was not subject to the constitutional mandate of a trial. Hence, defendant had not been required to waive a *constitutional* right as a condition precedent to youthful offender benefits. Raines v. State, 317 So. 2d 559 (1975), 12 CLB 85.

§ 91.05. Youth Corrections Act (18 U.S.C. 5005) —Dorszynski rule

Court of Appeals, 9th Cir. It has been established that a "youth offender" (i.e., anyone under the age of twenty-two at the time of conviction) may not be sentenced as an adult until the court has first made an explicit finding, pursuant to 18 U.S.C. § 5010, that the youth will not benefit from treatment under the Youth Corrections Act. Dorszynski v. United States, 418 U.S. 424, 94 S. Ct. 3042 (1974).

The instant case involved the application of 18 U.S.C. § 4209, which deals with persons between the ages of twenty-two and twenty-six, called "young adult offenders." This section is couched in more discretionary terms and provides that "if" the court finds reasonable grounds to believe the defendant will benefit, then sentence "may" be imposed under the Youth Corrections Act. Defendant contended that the trial judge erred in sentencing him without first making a specific finding that he would not benefit from treatment under the Act.

The court held that inasmuch as 18 U.S.C. § 4209 is "phrased in terms that grant the sentencing court an option," it cannot be read to require a court to make an explicit "no-benefit" finding before sentencing under other provisions outside the Youth Corrections Act. Congress, the court said, did not intend 18 U.S.C. § 4209 as a general extension of the Youth Corrections Act, but rather that it should be applied only in "exceptional cases." United States v. Cruz, 523 F.2d 473 (1975), 12 CLB 196.

§ 91.08. —Sentencing; plea bargaining

Court of Appeals, 4th Cir. *See* United States v. Crowe, 516 F.2d 824 (1975), 12 CLB 81, CLD § 65.65.

MISCELLANEOUS

§ 92.10. Assigned counsel's right to compensation—in general

New York Shortly after they had been appointed to represent him, a murder defendant confided to his two attorneys that he had committed three additional murders and could direct them to the location of the bodies of two of his victims. Conceiving it their duty to keep this confidence inviolate, counsel did not inform the police. At trial, however, defendant himself revealed the facts concerning the other murders during the course of his testimony on the stand. The revelation that his appointed counsel had withheld this information from the authorities caused a public uproar, which led to the institution of grand jury proceedings for criminal wrongdoing against one attorney. Although he was subsequently cleared, the entire incident had a disastrous effect upon both men's practices and incomes.

The court, in granting their applications for compensation above the $500 statutory limit, held that the fact that the attorneys had maintained such losses after having "acted in the highest tradition of the legal profession," constituted "extraordinary circumstances" entitling them to additional compensation. Application of Armani, 371 N.Y.S.2d 563 (N.Y. County Ct. 1975), 12 CLB 102.

§ 92.20. Criminal justice

"An Analysis of Standards for Criminal Justice Structure and Organization" by Daniel L. Skoler, 12 CLB 410 (1976).

"From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice" by B.J. George, Jr., 12 CLB 253 (1976).

"Recent Developments: Criminal History Records – Collection, Storage, and Dissemination of Information" 12 CLB 583 (1976).

"Three Models of Juvenile Justice" by Daniel Katlin, John Kramer, and Drew Hyman, 12 CLB 165 (1976).

§ 92.40. Freedom of the press

United States Supreme Court On November 13, 1975, Justice Blackmun, as circuit judge, filed the first of two opinions with respect to a petition brought by various members of the news media for a stay of an order by a Nebraska district court, affirming a lower court protective order placing far-reaching restrictions upon pretrial publicity in a pending sensational multiple sex-murder case. He declined, without prejudice, to then consider the issue in the expectation that the Nebraska high court would immediately take up the matter.

On November 20, 1975, Justice Blackmun, citing the continuing slowness of the Nebraska Supreme Court in considering the matter (with its consequent irreparable impact upon the exercise of First Amendment rights), issued a partial stay.

The criminal case in question involved multiple sexual assaults and murders of six members of a family; and defendant had apparently made statements against interest and had left an incriminating note. The lower state court's protective order had emanated from a holding, made prior to the holding of the preliminary hearing, that there existed a reasonable likelihood of newspaper publicity so prejudicial as to impede, if not make impossible, the impaneling of an impartial jury.

The protective order had provided, in substance, that no party to the action, no attorney connected with the defense or prosecution, no judicial officer or employee, and no witness or "any other person present in Court" was to "release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." It went on to order that no "news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." Excepted, however, were

(1) Factual statements of the accused's name, age, residence, occupation, and family status;
(2) The circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation);
(3) The nature, substance, and text of the charge;
(4) Quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public;
(5) The scheduling and result of any stage of the judicial proceeding held in open court;
(6) A request for assistance in obtaining evidence; and
(7) A request for assistance in obtaining the names of possible witnesses.

The Nebraska Bar-Press Guidelines were intended as a "voluntary code," and the guidelines are merely suggestive, with vague and indefinite admonitions concerning "generally" appropriate or inappropriate material for press disclosure.

In issuing his partial stay, i.e., that portion of the restrictive order that incorporated the Guidelines, Justice Blackmun concluded that guidelines which, by their own terms, were merely suggestive and, accordingly, necessarily vague and in-

definite, "do not provide the substance of a permissible court order in the First Amendment area," and the best course was to stay their mandatory and wholesale imposition. Moreover, held the Justice:

> "No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. . . . *These facts in themselves do not implicate a particular putative defendant.*" [Emphasis added.]

In so holding, Justice Blackmun was at pains to point out that he was not imposing a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial, since "restraints of this kind are not necessarily and in all cases invalid." And he was particularly conscious of the fact that the district court's order applies only to the period prior to the impaneling of a jury at the forthcoming trial – a time when contamination of jurors and witnesses was greater than during the trial phase when they could otherwise be shielded from prejudicial publicity.

He went on to conclude that "certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial," and that a confession or statement against interest was the paradigm of this.

Finally, the restrictive order had also prohibited disclosure of the "exact nature of the limitations" that it was imposing on publicity. The Justice likewise stayed this restriction. However, he refused to stay the provision that "the restriction on reporting confessions may itself not be disclosed," since there is "no point in prohibiting the reporting of a confession if it may be reported that one has been made but may not be spoken of." Nebraska Press Ass'n v. Stuart, 96 S. Ct. 237, 251 (1975), 12 CLB 189.

§ 92.50. Legal ethics

New Mexico *See* State v. McCuistion, 537 P.2d 702 (1975), 12 CLB 90, CLD § 51.08.

New York *See* Application of Armani, 371 N.Y.S.2d 563 (N.Y. County Ct. 1975), 12 CLB 102, CLD § 92.10.

New York *See* People v. Arocho, 379 N.Y.S.2d 366 (N.Y. Sup. Ct. 1976), 12 CLB 475, CLD § 51.03.

"The Role of a Prosecutor in a Free Society" by Hugh L. Carey, 12 CLB 317 (1976).

§ 92.60. Use of informants

New York *See* People v. Hicks, 38 N.Y.2d 90, 378 N.Y.S.2d 660 (N.Y. App. 1975), 12 CLB 465, CLD § 9.15.

§ 92.85. Relief from civil disabilities

Massachusetts Alger Hiss was convicted in 1950 before a federal court of two counts of perjury. As a result of this conviction, Hiss was disbarred in Massachusetts in 1952. Twenty-two years later, in 1974, Hiss, who had always maintained his innocence, petitioned for reinstatement to the Massachusetts bar.

In taking up the matter, the Supreme Judicial Court of Massachusetts asserted that its decision rested upon the solution of three "fundamental" questions, namely:

> "(1) Were the crimes of which Hiss was convicted and for which he was disbarred so serious in nature that he is forever precluded from seeking reinstatement? (2) Are statements of repentance and recognition of guilt necessary prerequisites to reinstatement? (3) Has Hiss demonstrated his fitness to practice law in the Commonwealth?"

In considering the first question, the court stressed at the outset that the deter-

minations of the factual and legal issues in the criminal case were to be deemed conclusive and were not presently subject to review. Thus, Hiss's guilt was established. The court held, however:

> "We cannot now say that any offense is so grave that a disbarred attorney is automatically precluded from attempting to demonstrate . . . that he has achieved a 'present fitness' . . . to serve as an attorney and has led a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions."

The court explicitly rejected the concept of disbarment as "a permanent punishment imposed on attorneys as a supplement to the sanctions of the criminal law."

In taking up the second question, the court held that changed character could be demonstrated irrespective of continued denial of guilt of crimes for which an attorney has previously been convicted and disbarred. Reinstatement could not be denied "solely" because of continued protestation of innocence. "Repentance or lack of repentance," said the court, "is evidence like any other, to be considered in the evaluation of a petitioner's character and of the likely repercussions of his requested reinstatement."

Having thus disposed of the first two issues, the court found upon review of the "ample evidence" presented before the Board, that Hiss was presently fit to serve as an attorney, notwithstanding his continued protestation that he was innocent and that his character remained the same today as it was at the time of the alleged crimes. *In re* Hiss, 333 N.E.2d 429 (1975), 12 CLB 101.

§ 94.00. Administrative subpoenas

Tennessee It is settled law in Tennessee that a district attorney conducting a criminal investigation does not have the power to issue administrative subpoenas requiring third persons to produce evidence before him or a member of his staff. This has been deemed to be a usurpation of the proper function and duties of a grand jury. State law does, however, permit agents of the Tennessee Bureau of Investigation to issue such subpoenas, to administer oaths, and to take written statements from witnesses. Sheets v. Hathcock, 528 S.W.2d 47 (Tenn. Crim. App. 1975), 12 CLB 220.

§ 95.00. Mootness doctrine

United States Supreme Court A state prisoner sued the North Carolina Board of Parole, claiming the Board was obligated under the Fourteenth Amendment to accord him certain procedural rights in considering his eligibility for parole. Since the prisoner's temporary parole status ripened into complete release from supervision prior to the Court's opportunity for review, he filed a suggestion of mootness. The parole board nonetheless urged that the case was not moot and that it presented an issue which was "capable of repetition, yet evading review" as that term has been used in cases dealing with mootness.

Held, the case was moot. In the absence of a class action, the "capable of repetition, yet evading review" doctrine, said the Court, was limited to the situation where two elements combined:

> "(1) [T]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Weinstein v. Bradford, 96 S. Ct. 347 (1975), 12 CLB 337.

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"Men of power and the criminals in our society are distinguished only by their situation, not their morality."

—Francis Ford Coppola,
Director, "The Godfather"

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